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MARRIAGE AND DIVORCE:-
A COMPARISON BETWEEN HINDU AND CANADIAN LAWS

by

© RAJIV MALHOTRA

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF LAWS

FACULTY OF LAW

EDMONTON, ALBERTA

FALL, 1972

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Thesis
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AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance a thesis entitled MARRIAGE AND DIVORCE - A COMPARISON BETWEEN INDIAN AND CANADIAN LAWS by RAJIV MALHOTRA in partial fulfilment of the requirements for the degree of Master of Laws.

ABSTRACT

Marriage is traditionally recognized as the foundation of the Indian Society and the family is the fundamental unit of the social organisation. A stable family environment not only benefits society as a whole, but it is essential for the well being and happiness of the individual. With the pressure of a mobile society upon individuals living in a developing country such as India, the basic unit, the family is undergoing stress and change. The numbers of broken homes and one-parent families is increasing. With the social change comes the problem of providing suitable legislations to assist those in need who face difficult adjustments to modes of life to which they are unaccustomed. Public interest in Marriage and Divorce law and practice has developed markedly in India in the recent years and the opinion has grown that these laws have become inadequate to meet the needs of modern society.

The purpose of this thesis is to attempt to determine the extent of problems faced by Indian society and to seek solutions for some problems by way of law reforms. For this purpose, a comparative study of the Hindu and Canadian law has been made and a series of recommendations arising from the study have been incorporated in the body of the text.

The experience of the West, more specifically that of Canada was studied with a view to suggest modification in Hindu law with reference to the law of Marriage and Divorce. At the outset the question arises: In what way is the experience of the West material and useful?

The impact of Westernization in India may be said to have commenced from the middle of the 19th Century when the administration of the East India Company gave way to the Imperial Administration. There was a steady stream of Westernization of the laws in all fields excepting

Family Law. Though the British administration adopted an attitude of non-interference in the personal laws of the peoples of India, the process of interactions with the Western culture and ideas, which were individualistic in character, nevertheless left their mark. These influences weakened the traditional controls of the families to a large extent and subjected them to the impact of social conditions of the West, though varying in their extent and results.

The study is divided into two parts: one dealing with the laws of marriage and the other with divorce. The details of the Hindu law are complicated and their contemporary context is set out in Chapter I and V with reference to some other personal laws prevalent in India. Chapter II and III are devoted to Contracts to Marry and Contract of Marriage. Chapter IV deals with Annulment. The grounds and bars of Divorce are set out in Chapter VI and VII. Chapter VIII further discusses the effect of Divorce and other Matrimonial Reliefs. Chapter IX gives a brief outline of the laws of Quebec, and a series of recommendations that arise out of the study are set out in the various Chapters and in the last Chapter.

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ABBREVIATIONS

The following abbreviations have been used for Law Reports and journals in the thesis.

[A] INDIAN LAW

A.I.R. All.	All India Reporter	Allahabad
A.I.R. A.P.	All India Reporter	Andhra Pradesh
A.I.R. Bom.	All India Reporter	Bombay
A.I.R. Cal.	All India Reporter	Calcutta
A.I.R. Ker.	All India Reporter	Kerala
A.I.R. Mad.	All India Reporter	Madras
A.I.R. M.P.	All India Reporter	Madhya Pradesh
A.I.R. Ori.	All India Reporter	Orissa
A.I.R. Pat.	All India Reporter	Patna
A.I.R. P.C.	All India Reporter	Privy Council
A.I.R. Rajth	All India Reporter	Rajasthan
A.I.R. Rang.	All India Reporter	Rangoon
A.I.R. S.C.	All India Reporter	Supreme Court
All.	Indian Law Reports	Allahabad
Bom.	Indian Law Reports	Bombay
B.L.R.	Bengal Law Reports	Bengal
Bom. L.R.	Bombay Law Reports	Bombay
Cal.	Indian Law Reports	Calcutta
I.A.	Indian Appeals	London
I.I.L.I.	Journal of Indian Law Institute	
K.L.T.	Kerala Law Times	Kerala
Mad.	Indian Law Reports	Madras
M.I.A.	Moore's Indian Appeals	London

M.L.J.	Madras Law Journal
S.C.D.	Supreme Court Decisions
S.C.R.	Supreme Court Reports

[B] CANADIAN AND ENGLISH

All E.R.	All England Reports
All E.R. Rep.	All England Reports Reprints
Alta. L.R.	Alberta Law Reports
App. Cas.	Appeal Cases
B.C.R.	British Columbia Law Reports
C.C.	Civil Code
C.C.C.	Canadian Criminal Code
C.R. (Can.)	Canadian Criminal Reports
Ch. D.	Chancery Division
D.L.R.	Dominion Law Reports
Ex. D.	Exchequer Division
I.L.R.	Institute Law Reporter
K.B.	King (or Queen's] Bench
L.R.A. & E.	Admiralty and Ecclesiastical Cases
L.R. C.C.R.	Crown Cases Reserved
L.R. Ch. App.	Chancery Appeal Cases
L.R. P. & D.	Probate and Divorce Cases
L.T.	Law Times Reports
Man. R.	Manitoba Reports
M.P.R.	Maritime Province Reports
N.B.R.	New Brunswick Reports
Nfld. R.	Newfoundland Reports
N.S.R.	Nova Scotia Reports

O.A.R.	Ontario Appeal Reports
O.R.	Ontario Reports
O.W.R.	Ontario Weekly Reports
P [ ]	Probate Admiralty and Divorce Division
P.D.	Probate Division
P.E.I.	Haszard and Warburton's Reports Prince Edward Island
Q.B.D.	Queen's Bench Division
Q.L.R.	Quebec Law Reports
Sask. L.R.	Saskatchewan Law Reports
W.L.R.	Western Law Reports
W.W.R.	Western Weekly Reports
W.W.R. [N.S.]	Western Weekly Reports [New Series]
T.L.R.	Times Law Reports

[C] OTHERS

C.L.R.	Commonwealth Law Reports (Australia)
F.L.R.	Federal Law Reports (Australia)
I.R.	Irish Reports
N.Z.L.R.	New Zealand Law Reports
Vict. L.R.	Victorian Law Reports
Wendall [N.Y.]	United States State and Regional Nominate
Ind. Terri.	United States State and Regional Modern

[D] PERIODICALS AND JOURNALS

Alta. L. Rev.	Alberta Law Review
Am. Bar Assoc. J.	American Bar Association Journal
Ben. L.J.	Benaras Law Journal
Can. Bar Rev.	Canadian Bar Review

Can. L.T.	Canadian Law Times
Chitty L.J.	Chitty's Law Journal
Fam. L.J.	Family Law Journal
Harv. L. Rev.	Harvard Law Review
Jaip. L.J.	Jaipur Law Journal
L.J.	Law Journal
L.Q.R.	Law Quarterly Review
Mal. L.J.	Malaya Law Journal
Mal. L.R.	Malaya Law Review
Mod. L. Rev.	Modern Law Review
N.Y.U. L. Rev.	New York University Law Review
Osgoode L.J.	Osgoode Hall Law Journal
R. du. B.	Revue de Barreau [for Quebec law]

CHAPTER ONE

HISTORY OF THE LAW RELATING TO MARRIAGE

India today is a vast country with a population of five hundred and fifty million people and thus one finds unity amidst diversity. It is inhabited by various social, religious and cultural groups professing different creeds, faiths and beliefs and following a distinctive pattern of life of their own. Wherever the laws of India admit the operation of a personal law, the rights and obligations of a Hindu are determined by Hindu Law. This is his traditional law, sometimes called the law of his religion, and it is subject to the exception that any part of that law may be modified or abrogated by statute. Hindu Law has the most ancient pedigree of any known system of jurisprudence.[1] Hindu Law during the seventies of the last century was in a state of arrested progress in which no voices were heard unless they came from the tomb. It has now shown an amazing adaptability to modern conditions. In fact there is no department of Hindu Law in which progress is not visible. Distinguished judges, Indian and European, both in India and on the privy council, have during a century, notwithstanding occasional set-backs and cross-currents, helped to develop Hindu Law to suit the new and complex needs of a highly progressive society.[2]

[A] THE LAW BEFORE THE CODIFICATION

(i) General

Law as understood by the Hindu is a branch of Dharma.[3] Its ancient

---

1 Mulla: "Hindu Law", (Bombay) (13 ed. - 1966) at p. 1.

2 Mayne: "Hindu Law and Usage", (Madras) (11 ed. - 1953) Preface IX.

3 Means the aggregate of duties and obligations, religious, moral, social and legal.

frameworth is the law of the Smritis.[4] It was an Article of belief with the ancient Hindu that his law was Revelation, immutable and external. Shruti was accepted as the original utterings of the great Power. The Shrutis though accepted as precepts emanating from that source were couched in the words of the Rishis or sages of antiquity who saw or received the revelations and proclaimed their recollections.[5] According to the needs and progress of Hindu society, new customs evolved and were recognized in Smritis and were incorporated into law. Thus the law was amended by great sages like Manu, Yajnavalkya and others but these men attempted to support their amendments with the text of Shruti in order to derive sanction from divine authority. The Smriti of Yajnavalkya gives a list of twenty sages as law givers. They are as follows: Manu, Atri, Vishnu, Harita, Yajnavalkya, Usanas Angiras, Yama, Apastamba, Samvarta, Katyayana, Bhrispati, Parasara, Vyas, Sankha, Likhita, Daksha, Gautama, Satatapa, and Vasishtha. These are the propounders of Dharam Sastras.[6] Little is known of these authors and it is impossible to ascertain when they lived. While professing to interpret the law laid down in the Smritis they introduced changes to harmonize the law with the usages of those governed.[7]

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4 Text embodying traditional (legal) learning.

5 Mulla: "Hindu Law", supra note 1 at p. 5.

6 Science of Dharma, jurisprudence; they are generally works written in verse prose or in mixed prose and verses.

7 Atmaram v. Bajirao, (1935) 62 I.A. 139.

(ii) Hindu Marriage - a Sacrament

The origin of marriage amongst ancient people in India is a matter for the science of anthropology. From the very commencement of the early ages marriage was a well established institution and the ideal of marriage was very high. The Hindu law was blended with religion and ethics and puts emphasis on the development of inner self of an individual rather than on things external.[8] On account of this feeling Hindus regarded marriage as a sacrament and not a contract. Hence the gift of the daughter to a suitable person was considered as a sacred duty enjoined upon father, which if duly performed, conferred upon him great spiritual benefits. Similarly it was deemed necessary to beget a son from lawful wedlock as the son alone could save the father from hell after his death. Thus the notion that marriage was an invisible sacred tie and union of flesh with flesh and bone with bone,[9] grew from the sacramental aspect of marriage. Marriage being a spiritual union of man and woman needed no registration and was not considered like the partnership of a joint business firm with an opportunity of separating under circumstances.[10]

(iii) Family Ideal

Since the sacredness of the marriage tie was repeatedly declared, the family ideal was decidedly high and it was often realized. The wife on her marriage was at once given an honoured position in the house. She

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8 B.S. Sinha: "The Hindu Marriage Act 1955: An Experiment in Social Legislation". (1968) S.C.D. Vol. 8, at p. 25.

9 Tehait v. Basant Kumar Singh, (1901) I.L.R. 28 Cal. 75.

10 P.K. Acharya: "Glories of Indian on Indian Culture and Civilization". (Bombay) (1962) at p. 3.

was associated in all the regligious offerings and rituals with her husband. As the old writers put it,[11]

> "a woman is half her husband and completes him." (Ardhangini)

Manu exhorted men to honour and respect women. In his words:[12]

> "Women must be honoured and adorned by their fathers, brothers, husbands who desire their own welfare. Where women are honoured, there the Gods are pleased; but where they are not honoured, no sacred rite yields rewards."

In the words of Yajnavalkya,[13]

> "The husband receives his wife from the gods; he must always support her while she is faithful."

Disputes between husband and wife were not allowed to be litigated either in customary tribunals or in the king's court. Neither bailment nor contracting of debt, neither bearing testimony for one another nor partition of property was allowed between them. In the words of Yajnavalkya[14]

> "Settling disputes in courts is unworthy. It should be resolved by the elders according to custom and usage because it is a family matter and should be decided in family otherwise there would be a loss of prestige for the family."

Intermarriage between persons of different castes was not uncommon in

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11 Vedic Index, I, 484-6.

12 This passage is quoted in A.I.R. (1946) 25 Pat. 58.

13 Ibid at p. 63.

14 Yajnavalkya, II, 52.

the earlier period, but as the caste system hardened, the restrictions increased.

The desire for male offspring in particular was very natural in all early societies. Male issue was prized both for the performance of funeral rites and for the continuance of the family. In the words of Manu:[15]

> "Endless are the worlds of those who have sons. There is no place for man who is destitute of male offspring. May our enemies be desitute of male offspring."

But a son of the body did not become a legitimate son if he was born of a wife of an unequal class.

Monogamy has been the rule through the early ages though it changed for some time in the later period. But the wife who was first wedded was alone the wife in the fullest sense. Apastamba says:[16]

> "If a man has a wife, who is willing and able to perform the religious duties and who bears sons, he shall not take a second wife."

Another set of text lays down special grounds which justified a husband in taking a second wife. It was only when a wife was barren, diseased, or vicious, that she could be superceded and a second marriage was valid. A peculiar sanctity, however, seems to have been attributed to the first marriage, as being that which was contracted from a sense of duty, and not merely for personal gratification.

Remarriage of widows was permitted in the early ages, (though later

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15 Manu, IV, 36 & 37.

16 Apastambha, II, 12 & 13.

on the system of Sati[17] came into existence). This seems originally to have taken the form of the marriage of the widow to the brother of her deceased husband or near kinsman in order to produce children. Manu disapproved of divorce and remarriage. In his words:[18]

> "The husband is declared to be one with his wife. Neither by sale nor by repudiation is a wife released from her husband. Once only a maiden is given in marriage."

Infant marriages were common enough in all castes and in all parts of India. While in Vedic times, adult marriage appears to be common, in the later periods child marriage so far as the bride was concerned, became normal; but the husband was as before an adult generally. Girls were married between the ages of 8 and 12 years. The marriage of Hindu children was therefore the result of an arrangement between the parents and the children themselves exercised no volition.[19]

As the great and primary object of marriage was the procuring of male issue, physical capacity was an essential requisite. Promise to marry an idiot or a lunatic was not binding.

There was no rule of Hindu law which required as an essential condition of a valid Hindu marriage that the bride should be a virgin. If a Hindu married with due formalities a girl who was not a virgin and whom he knew not to be a virgin, he himself having had an irregular connection with her

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17 The widow was burned alive on her husband's funeral fire.

18 Manu, IX, 45 - 47.

19 Purshotamdas v. Purshotamdas (1897) AIR 21 [Bom], 23.

before marriage, he is not entitled to repudiate the marriage subsequently on the ground of lack of virginity of the bride at the time of the marriage.[20] But it is submitted that the standard of morality was very high. The chastity of the women of all the castes was to be protected and respected.

Thus, it is noted that marriage in the ancient time was necessarily the basis of social organization and the foundation of important legal rights and obligations, Marriage was treated as a Samskara or a Sacrament. It was the last of the ten sacraments, enjoined by the Hindu religion for regeneration of men.

(iv) Hindu Law under the British Rule

The first step towards the ascertainment of the Hindu law during the British rule was taken by Warren Hastings.[21] A wrong notion appears to have gone abroad that the Hindus did not have any definite system of laws, and that whatever laws they had were all mixed up with superstitions and nothing else. Hastings was anxious to remove this misapprehension from the minds of the people. Also with a view to giving confidence to the people, to make it possible for the English judges in India to have some knowledge of the two ancient systems of law so as to better enable the courts to decide cases with certainty and despatch, to guide the decisions of the several courts, and to preclude arbitrary and partial decisions, Hastings projected the compilation of a code of Hindu Law, in English

---

20 Mandan Shethi v. Timmi Avva, (1939) 2 A.I.R. Mad. 882.

21 Governor General of India.

language with the best authority obtainable. Ten of the most learned Pandits were invited. The most authentic books on the Hindu law both ancient and modern were collected. The original text of the Hindu code was prepared in Sanskrit language. This text was then translated into Persian language, from which an English version was prepared by Nathaniel Brassey Halheid.[22]

Warren Hastings once said:[23]

> "The writers of Indian philosophy will survive when British denomination of India shall long have ceased to exist, and when the sources which yield wealth and power will be lost to remembrance."

The quality of these works compiled under the patronage of Warren Hastings was not rated very high. In 1794, Justice Jones of the Calcutta Supreme Court, a great linguist who had an intimate knowledge of 13, and a fair knowledge of 28 languages, published his "Institutes of the Hindu Law" or "The Ordinance of Manu". In the meantime, a digest of the Hindu Law was in the course of preparation. Jones could not see the completion of this work as he died early. The Digest of the Hindu Law, projected by him, was prepared after his death by Pandit Jagannath which was later translated into English by Colebrooke.

While the value of these re-statements in English was great, the real work of ascertaining and definitizing these systems was performed by the courts, especially the Privy Council. Now the choice arose; should the

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22 M.P. Jain: "Indian Legal History" (2nd - 1966) (Bombay) at p. 701.

23 A. Gledhill: "The British Commonwealth" (2nd ed. - 1964) (Stevens) at p. 259.

court attempt to find out the meaning of the Smritis or should it rely upon the interpretation given to the relevant Smritis by a recognized commentator whose book was commonly resorted to by the local Pandits. The Privy Council emphasized that the duty of a judge[24]

> "is not so much to inquire whether a disrupted doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage."

In another case[25] it was definitely laid down that

> "In the event of a conflict between the ancient text writers and the commentators the opinion of the latter must be accepted."

[B] CAUSES AND THE HISTORY OF CODIFICATION

The Hindu Family Law[26] which till recently remained largely static grew abruptly after the independence. In order to introduce reform in the Hindu society many important legislations have been brought on the Statute Book. This thesis will attempt to make a comparison between the Hindu Law and the Canadian Law and to suggest necessary and appropriate reforms in the Hindu Law.

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24 Collector of Madura v. Moottoo Ramalinga (1868) 12 M.I.A. 397.

25 Bhagwan Singh v. Bhagwan Singh, (1899) 26 I.A. 153;
See also Atmaram Abhimanji v. Bajirao, (1935) 62 I.A. 139.

26 See (1956) 53 B.L.R. 82, "Gajendragadkar's view on Hindu code". He observed (p. 106) during the British rule Hindu Law tended to be static and by reason of the infirmity from which the court suffered its further growth was inevitably arrested.
See also D.K. Lipstein: "Indian Yearbook of International Affairs", (1957) (Vol. VI - Bombay) at p. 293: The writer observed "British legislation was also to adapt Hindu Law to modern conditions, having regard to the reluctance of the British authorities to interfere in matters of personal law. Thus the respect for the customs and the feelings of population may well have retarded the development in India.

Although the reformist movement was generated by a powerful minority of Hindus, yet it became successful in its efforts to remodel Hindu society on modern lines. The idea to bring social reconstruction gained momentum due to many factors. The supporters of the social reform movement were convinced that Hindu Society cannot survive in its old form because of the lessening hold of religion on its members, increase in materialism and individualism, force of new ideas of social equality and necessity to save Hindu Law from religion and archaism.[27] Smritis according to them was necessary as it emphasized the essentials of Hindu Society and could be moulded to meet the changing conditions of India.[28] While expressing the need of progressive adjustments and suitable modifications Gajendragadkar[29] wrote as follows:

> "All social laws must be based on secular, rational and scientific considerations. The test must always be the test of social value. 'Dharma' in its secular sense aims at stabling social institutions and human relations and inevitably the rational test of social utility and the compelling considerations of social equality must be allowed their full sway in moulding the structure of Hindu Law today. The basis of Hindu Law derived from the proud inheritance of Hindu culture, history and traditions would naturally be respected but it would be an idle attempt to build the structure of today's Hindu Law on the text of "Manu" or "Yajnavalkya". The legislatures of today must bring about such changes and modifications in Hindu Law as would bring it in conformity with the best necessities of the present times and

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27 B.S. Sinha, "The Hindu Marriage Act 1955: An Experiment in Social Legislation", (1968) 8 S.C.D. at 23.

28 Dr. Radha Krishnan, the second President of India's forward in P.N. Prabhu's: "Hindu Social Organization".

29 Deolalkar: "The Hindu Marriage Act 1955" (Allahabad) (2nd ed. - 1964) Forward.

> would receive the whole-hearted approval of enlightened social conscience amongst the Hindus. . . . "

It was due to this urge that reform was needed and attempts were required to be made to put Hindu Law on more rational basis so that all Hindus are closely knit into one brotherhood of equals and are governed by one law irrespective of difference in case, creed and sex. Mr. Iyenger, who edited Mayne's "Hindu Law and Usage", said:[30]

> "While many parts of Hindu Law require reform and legislation may be welcome, it is essential that Hindu Law should be in a form readily accessible to the Indian ministers, politicians, legislators, the press and the public. A codification of Hindu Law of property and succession is very desirable. In future, the legislators will be frequently called upon to consider measures of reform. And any legislation will be most unsatisfactory if reform is undertaken at one point without envisaging its consequence throughout the whole field of Hindu law. The time has certainly come to cheapen the ascertainment of law to make it, if only in its broad outline, a common possession of all literate citizens and to minimize the inconvenience and complications of a personal law, intermixed as it is with local or family customs which have long outlived the needs of an earlier day, by the enactment of a code of Hindu Law applicable to the whole of Hindu India."

Thus, some of the main motives for recourse to the codifications of Hindu Law are as follows:

> (1) Features of the existing law which recognized the institution of caste were inconsistent with the democratization of the country and were

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30 (Madras) (11th ed. - 1953) Preface.

therefore to be abolished.

(2) For the same reason, rules of law which placed women at a disadvantage as compared with men were to be abolished.

(3) Certain topics of law suffered from uncertainty and a scandulous disharmony of decision between various (and numerous) high courts, and an opportunity to render certain which was uncertain or anomalous would be welcomed; and

(4) Finally any amendment which would tend to remove the many and striking distinctions between Hindus, and which would appear to render them a more homogeneous and unified people (even if only on paper), would be of great political as well as psychological value, and would on that account have an independent justification.[31]

The name 'Hindu Code Bill' which was the subject matter of the codification is now obsolete since the projected code was broken up for ease of treatment and was introduced Bill by Bill into the Indian Parliament. But the old name which originates from 1941 sticks and it is as such that the public knows of the project.[32] After the passing of the Hindu Women's Right to Property Act 1937, the Government of India by its resolution dated 25th January, 1941, appointed a committee, which is known as the Rau Committee, with the following terms of reference:[33]

(a) To examine the Hindu Women's Right to Property Act, and to suggest such amendments to the Act as would

(i) resolve the doubt felt as to construction

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31 Panikar: "Hindu Society at Cross Road", (Asia) (1961) at p. 138.

32 J.D.M. Derrett: "Hindu Law Past and Present",(Calcutta) (1957) at p. 53.

33 Khetarpal: "Codification of Hindu Law", in David Bauxam: "Family Law and Customary Law in Asia", (Hague - 1968) at 218.

of that Act;

(ii) classify the nature of the right conferred by the Act upon the widow; and

(iii) remove any injustice that might have been by the Act to the daughter;

(b) To examine and advise upon

(i) the Law of Inheritance Bill; and

(ii) the Hindu Women's Right to Separate Residence and Maintenace Bill.

The Report of 1941 merely urged the Government to go ahead with comprehensive legislation. Its aims were simple and the methods suggested easy. The committee found "that the Hindu Law is a complicated organic structure, the various parts of which are interconnected so that an alteration of one part may involve the alteration of the others." In the Report the committee pointed out how the question of adoption, validity of marriage or intercaste marriage, will making power, succession to property, maintenance, etc., were affected while considering the amendment of the Hindu Women's Property Act, 1937. The Committee observed:[34]

> "Defects of this kind are inevitable in piece-meal legislation effecting fundamental changes in the Hindu Law. The only safe course is not to make any fundamental changes by brief, isolated Acts; if fundamental changes are to be made, it is wisest to survey the whole field and a code; if not of a whole Hindu law, at least of those branches of it which are necessarily affected by the contemplated legislation."

This 1941 Report was accompanied by two draft Bills, each of which

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34 Report of the Hindu Law Committee, 1941.

was laid before a select committee of both houses of legislature. Much publicity was given to the project and as a result of this committee's report the Hindu Law Committee was revived in 1944 and under its chairman, Sir B.N. Rau, prepared a draft code dealing with Succession, Maintenance, Marriage and Divorce, Minority and Guardianship and Adoption. It was this code which was widely circulated and discussed and gave the name "Hindu Code Bill" to the whole project. The Committee published its report in 1947 including a revised draft of the code, compiled in the light of oral evidence and replies to questionnaires.[35]

It was the intention of the government that the Bill should become the law on 1st January, 1948, but the whole project was temporarily suspended when Independence led to the formation of a Constituent Assembly and the entire energies of the legislatures were taken up with the vast problems of consolidating the new regime. The Ministry of Law after making some changes in the Bill introduced it to the Constituent Assembly which was referred to a select committee under the chairmanship of the Hon. Dr. B.R. Ambedkar which reported it to the Constituent Assembly of India on 12th August 1948. The Hindu code (as amended by the select committee) was published consisting of nine parts, second being that of marriage and divorce. The Hindu Code Bill remained for consideration before the Constituent Assembly (Legislative) and the Provisional Parliament till September 1951, but it could not be passed before the dissolution of the Provincial Parliament. When the Parliament was elected in 1952 for the first time under the constitution, the matter of Hindu

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35 J.D.M. Derrett, "Hindu Law Past and Present" supra note 32 at 59-60.

Code Bill was again taken up. In view of the fact that considerable time would be required for the passing of the whole Hindu Code, it was thought that it would be better to split that Hindu Code Bill into certain parts and place each part separately before Parliament.

It may be mentioned that when the Hindu Code Bill was debated before the Provincial Parliament, it was argued by many prominent members in the Ruling Congress Party and the opponents of the code that in respect of such a revolutionary measure of social reform, vitally affecting the religion, culture and traditions of the Hindus who formed the bulk of the population, the Provincial Parliament had no mandate to pass such a bill in the absence of a referendum or approval by the majority of the people. When the Provincial Parliament was dissolved at the time of the election of the first new Parliament under the Constitution of India, Pandit Nehru, as a leader of the Congress Party, made it a part of the Congress Manifesto that if returned to power, the party would enact the Hindu Code Bill.[35A] After its return to power in 1952, the party introduced and passed legislation relating to various topics of Hindu Law one of them being The Hindu Marriage Act, XXV of 1955 which still today governs the Hindus.

[C] WHO ARE HINDUS

At this moment "Hindu Law" more or less modified by custom is applicable to about 450 million people in India alone and eventually the total will be swelled not only by the natural increase in the population

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35A H.K. Shah: "History of the Hindu Code" (1958) Bom. L.R. 81.

but by the gradual inclusion of the backward tribes within the pale of the general Hindu Law.

The term 'Hindu' has a very wide significance in the Indian legal system. It means a person who professes the Hindu religion but the person need not necessarily be an orthodox Hindu for the purpose of application to him of the Hindu law.[36] It was difficult at times for the courts to decide to whom the word 'Hindu' should apply, but when the hurdle had been surmounted we find the Hindus to be as diverse in race, psychology, habitat, employment and way of life as any collection of human beings that might be gathered from the ends of the earth. Semi-nomadic herdsmen and Gypsies, world famous dancers and exquisite poets, stone-breakers and Supreme Court judges, dwellers in huts rudely fashioned, from desert Rajasthan to humid Malabar and from the frozen Himalayas to the relaxing Bengal - all these can be subject to Hindu Law.[37]

The application of Hindu Law has always been a matter of controversy and the problem divided itself into two compartments. Who are to be called Hindus for the purposes of Hindu Law; and who are entitled to be exempted from the application of certain rules of Hindu Law. The Dharmasastras deal with four castes - Brahmans, Kshatriya, Vaishya and

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36 M.P. Jain: "The Marriage and Divorce Laws of India", in Kojiro Miyazaki "A comparison of laws relating to Marriage and Divorce" (Tokyo - 1960) at p. 526.

37 J.D.M. Derrett "Hindu Law Past and Present" supra note 32 at 76.

Sudra. The older books assume that those outcasts who do not fall within the King's jurisdiction are bound by their own customs, which have nothing to do with their Shastric law. As the time went on non-Hindus came within the pale of judicial administration, it was more or less agreed that although their customs did not derive from the Vedas, and could not pretend to have any Shastric sanction, nevertheless the King was obliged to respect them and enforce them in mutual disputes.

British judges were perplexed by the difficulties which faced them. Many took the view that the Hindu Law of the textbooks was never intended to and never in fact did bind primitive tribes - that in fact it was always a prerogative of Brahmans. This view is now regarded as academically unsound. But the courts, however, worked out certain very subtle distinctions which at present cover this subject. The Hindu Law before the new enactments applied not only to Hindus by birth, but also to Hinduism,[37A] to illegitimate children where both parents are Hindus,[38] to illegitimate children where the father is a Christian and mother a Hindu, and the children are brought up as Hindus,[39] to Jains,[40] Buddhists in India, Sikhs[41] and Brahmans[42] except so far as such law is

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37A Palanippa Chetty v. Alagan (1921) 48 I.A. 539.

38 Dattatraya Tatya v. Matha Bala, [1934] 58 Bom. L.J. 119.

39 Myna Boyee v. Dotaram, [1861] 8 M.I.A. 400.

40 Rupchand v. Jumbo Pershad, [1910] 37 I.A. 93.

41 Rani Bhagwan Koer v. Bose, [1903] 30 I.A. 249.

42 Vishnu v. Akkamma, [1911] 34 Mad. L.J. 496.

varied by custom and to Lingyats who are considered Sudras.[43] It also applied to a Hindu by birth who having renounced Hinduism has reverted to it after performing the religious rites of expiation and repentence,[44] or even without a formal ritual of reconversion when he was recognized as a Hindu by his community,[45] and to Hindus who made declaration that they are not Hindus for the Special Marriage Act, 1872. Their Lordships in Bhaiya v. Ganga[46] held that

> "A person who is born a Hindu and has not renounced the Hindu religion does not cease to be a Hindu merely because he departs from the standards of orthodoxy in matters of diet and ceremonial observance."

The words in the Hindu Marriage Act 1955,[47] i.e.

> "Any person who is a Hindu by religion in any of its forms and development."

give legislative approval to the numerous decisions noted above. The reformers desired to make it clear that 'Hindu' was not merely a religious denomination and wanted to abolish the uncertainty. The Code, except where otherwise provided, shall apply[48] to

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43 Trikamganda v. Shirappa, [1943] Bom. L.R. 706.

44 Kusum v. Satya, [1903] 30 Cal. L.R. 999.

45 Durga Parasada v. Sundarsanaswani, [1940] M.I.A. 513.

46 [1913] 41 I.A. 1.

47 The Hindua Marriage Act 1955, Sec. 21(a).

48 The Hindu Marriage Act 1955, Section 2(i).

(a) one who is a Hindu by religion in any of its forms and development,

(b) any person who is a Buddhist, Jain or Sikh by religion, and

(c) any person domiciled in India who is not a Muslim, Christian, Parsi, Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with by if this Act had not been passed.

Thus it may be gathered from the above discussion that India is inhabited by various social, religious and cultural groups, professing different creeds, faiths and beliefs and following a distinctive pattern of life of their own. One of the results of this diversity is that there is no single uniform law relating to marriage and divorce. At this stage it may be relevant to point out what personal laws are applicable to peoples of other major religious denominations living in India.

[D] SYSTEMS OF LAWS APPLICABLE TO NON-HINDUS

The Indian Constitution[49] gives expression to the ideal of creating a civil code which may apply to all Indians uniformly, irrespective of their caste, colour, religion or creed. This is a directive principle of state policy and all the statutory enactments after this are steps toward the realization of their ideal. Yet it will be some time before this ideal is fulfilled and achieved. Till then India has to contend with the diverse system of Marriage and Divorce laws.

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49 Article 44: "The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

In the words of M.P. Jain,[50]

> "The practice of applying matrimonial laws according to the religious belief has led to the currency of diverse matrimonial laws besides the one general statutory law."

There are in India broadly speaking four distinct religious communities - Muslims, Christians, Parsis and Jews (excluding Hindus which is the main). Each of these communities has its own distinctive system of Marriage and Divorce law. This state of affairs is the direct consequence of the policy adopted by the British to preserve to the natives their own laws in matters concerning their families.[51]

(i) Muslim Law

The Muslim Law or the Mohammedan Law is applied as a branch of personal law in certain matters including Marriage and Divorce to those who belong to the Muslim persuasion. By the Shariat Act, 1937[52], it has been made clear that in respect of marriage and dissolution of marriage, etc., Mohammedans shall be governed by the Muslim Personal Law (Shariat), notwithstanding any custom or usage to the contrary. The Mohammedan Law applies to all Muslims whether they are by birth or by conversion a person who acknowledges

(a) that there is but one God,

(b) that Mohammed is his prophet

is a Muslim.[53]

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50 M.P. Jain: "The Marriage and Divorce Laws of India" supra note 36 at p. 3.

51 See Warren Hastings Plan of 1772: also Act of Settlement 1791.

52 Section 2.

53 Mulla: "Principles of Muhammedan Law" (Bombay) (1955) at 19. See also Fyzee, "Outlines of Muhammedan Law" (Allahabad) (1955) at 46.

The Mohammedans are divided into two sects - Shias and Sunnis and each sect is further divided into several sub-sects. Each sect and sub-sect is governed by its own distinctive version of Mohammedan law.[54]

Muslim Law is considered to be of divine origin. It is so intimately connected with religion that it cannot readily be dissevered from it. Generally speaking there are four traditional sources of this law:

(a) The Koran which is regarded as the very word of God.

(b) Hadis, i.e. records of Precepts, actions and sayings of the Prophet; and which includes reason.

(c) Ijma, that is a concurrence of opinion of the companions of Mohommed and his disciples.

(d) Kiyas which are analogical deductions derived from a comparison of the first three sources when they did not apply to a particular case.[55]

As a result of Muslim Law being applied in India for such a long time, many decisions have been rendered by the court and so it is not necessary for a present day lawyer to look beyond the declaration of the court. The theory of Precedent for all practical purposes applies in

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54 Mulla: Ibid at 6.

55 Mulla: "Principles of Mohammedan Law" supra note 53 at VI and VII - introduction
See also Fyzee: "Outlines of Mohd. Law" supra no. 53 at 70.

India and there are, practically, on all points authoritative judicial pronouncements.

Every Muslim of sound mind who has attained puberty can enter into a contract of marriage. Lunatics and minors who have not attained puberty may be validly contracted in marriage by their guardians. The age of puberty is presumed to be 15 years. A Muslim woman cannot have more than one husband but a Muslim man can have as many as four wives at a time. The marriage with a fifth wife is not void but is irregular. Muslims belonging to different sects may intermarry. A Muslim is prohibited from intermarrying certain persons related to him by consanguinity or affinity or fosterage. Such a marriage is irregular and not void.

Mohammedan Law does not prescribe any specific ceremonial or any special rites for the solemnization of a marriage. What is necessary is that there should be a proposal by or on behalf of one party and its acceptance by or on behalf of the other in the presence and hearing of two male[56] witnesses who must be sane and adult Mohammedans. Both the proposal and acceptance must be expressed at one meeting.

Mohammedan Law is very liberal in the matter of divorce by the husband. There is no restraint upon him in the exercise of such a right. This peculiarity of the Mohammedan Law has its roots in the past history of the pre-Islamic days when the civilized concept of marriage was

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56 Or, one male and two female witnesses
Kazi Siddique Hossain v. Salima Khatoom (1916) 43 I.A. 212.

practically absent and divorce was a very frequent occurrence. Islam deprecated this tendency and tried to curb it to some extent. But, in the essence, the main structure of the Mohammedan Law of divorce still remains based upon the relics of these old customs. The result thus is that any Mohammedan of sound mind, who has attained puberty may divorce his wife whenever he desires without assigning any cause.[57] A talak (divorce) may be effected by the husband either by orally spoken words, or by a written document. Commenting on this position, Fyzee observes:[58]

> "The law of divorce, whatever its utility during the past, was so interpreted, that it has become a one-sided engine of oppression in the hands of the husband. And almost everywhere, Muslims are making efforts to bring the law in accord with ideas of social justice."

The Indian Parliament has not yet been able to do anything to improve the situation in this respect due to the peculiar political circumstances existing in the country.

(ii) Christian Law

In spite of the fact that Indian Law regarding intercommunal marriage is not well settled, the special Marriage Act 1954 can be availed on if parties governed by different personal laws want to marry. A marriage under this Act, complying with its requirements, will be regarded as valid notwithstanding anything to the contrary in the respective personal laws of the parties.

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57 Mulla: "Principles of Mohd. Law" supra note 53 at 264-5.

58 Fyzee: "Outlines of Mohd. Law", supra note 53 at 125.

Apart from the special Marriage Act, there is another enactment - The Indian Christian Act which provides that a marriage between persons one of whom is a Christian, can be solemnized under that Act. This is subject to the provisions of the Special Marriage Act. The net result of these two enactments is that intercommunal marriages between a Christian and non-Christian must in order to be valid, be solemnized under one of these Acts. But whereas under the Indian Christian Marriage Act, the marriage must not be one prohibited by the personal law of either of the parties, under the special Marriage Act, prohibitions under the personal laws of the parties are not relevant.[59]

The law relating to solemnization of marriage between persons, one or both of whom is or are a Christian or Christians is contained in the Indian Christian Marriage Act 1872 (read with Marriage Validation Act 1892).[60]

Such a marriage shall be solemnized[61]

(i) by any person having episcopal ordination, provided the marriage be solemnized according to the rules, rites, ceremonies and customs of the church of which he is a minister.

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59 M.P. Jain: "A Comparison of Laws Relating to Marriage and Divorce" supra note 53 at 31.

60 The Act was not intended to regulate the substantive law of marriage among the Christians as to essentials. It only consolidated and amended the law for solemnization of a Christian marriage.

61 Sections 5, 6, 7, 9 of the Indian Christian Marriage Act 1872.

(ii) by any clergymen of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland; or

(iii) by the Minister of Religion licensed to solemnize marriages; or

(iv) by or in the presence of a marriage registrar;

(v) by any person licensed to grant certificates of marriages between Indian Christians.

Generally, a Christian marriage under the Christian Marriage Act shall be solemnized between 6 a.m. and 7 a.m.[62]

The certificate of marriage is not issued until one of the persons intending marriage has appeared personally before the minister and made a solemn declaration;

(i) that he or she believes that there is no impediment of kindred or affinity or other lawful hindrance to the said marriage; and when one or both of the parties is or are minors;

(ii) that the consent required by the law has been obtained thereto or there is no person resident in India having authority to give

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62 Indian Christian Marriage Act Section 10: Certain clergymen named in this section may however perform a marriage between other hours.

such a consent.

After the minister issues the certificate, the marriage may be solemnized according to such form of ceremony as the minister thinks fit to adopt in the presence of at least two witnesses besides him. The certificate of marriage becomes void if marriage is not solemnized within two months from the date of its issue. Similar procedure is prescribed for issuing a certificate if a marriage is solemnized before a marriage registrar. The marriage may if there is no lawful impediment, be solemnized according to any form and ceremony which the parties wish to adopt in the presence of a marriage registrar and two or more credible witnesses; at some stage of the ceremony each of the parties should recite a prescribed formula. The marriage is to be certified if:

(i) the ages of the parties intending to be married exceeds 16 years in the case of a man, 13 years in the case of a woman.

(ii) neither of the persons has a wife or husband still living.

(iii) in the presence of a licensed person and of at least two credible witnesses each of the parties recites a given formula.

All marriages solemnized under the Christian Marriage Act must be registered according to its provisions. As already pointed out above this Act primarily deals with the solemnization and registration of marriages between persons one of whom at least professes the Christian faith. Though it does not deal directly with the essentials of a Christian marriage, some of the circumstances which disqualify a Christian from contracting a marriage can be deduced from the combined

study of the Indian Divorce Act and the Indian Christian Marriage Act. Thus a Christian can enter into a valid marriage if inter alia

(i) he is not impotent, lunatic or idiot;

(ii) he does not have a husband or wife living.

Christians cannot marry within the prohibited degrees of consanguinity or affinity. There is no enactment in India so far as the Christians are concerned, which expressly defines the prohibited degrees. Accordingly each case is decided on its own merits in accordance with the general principles.

The Indian Christian Marriage Act[63] further lays down that the Act does not validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into. The term "personal law"[64] here means the personal law of the religious community to which the party belongs. This includes any personal law, (apart from any personal law as to the form of marriage), which forbids either of the parties to enter into a contract of marriage with one another to the extent of rendering it a nullity. The personal law of a party must not only forbid the party to enter into the marriage but must hold it as not being legal but null and void ab-initio. The provision refers to the personal law of either party which relates to absolute impediments to any marriage between the parties.

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63 Indian Christian Marriage Act - Section 88.

64 Saldanha v. Saldanha; (1930) I.L.R. (Bombay) 301.

(iii) Parsi Law

As far back as 1835 efforts were made by the members of the Parsi Community[65A] to have laws suitable to their social requirements, but these early efforts proved abortive. Ultimately in 1885 the Parsi Law Association was established for the purpose of drafting special Bills for law applicable to Parsi Community, relating inter alia to the law of marriage and divorce. The Act that was passed as a result of this was the Parsi Marriage and Divorce Act.[66]

This Parsi Marriage and Divorce Act of 1865 was based on the Matrimonial Causes Act, 1857, of England, and its principal effect was to make Parsi marriage monogamous. Since then circumstances altered. Moreover the Act was itself defective in many respects. Adultery by itself or adultery coupled with some other offence were the only grounds for divorce under the Act. On no other ground could marriage be dissolved by divorce under it. Again, a provision of that Act empowered only the wife to ask for judicial separation on the ground of cruelty, or because her husband brought a prostitute into the house; the husband had no remedy by way of seeking judicial separation.

To remedy these defects, and to bring the Law of Marriage and Divorce in conformity with the current conditions and views of the Parsi Community, the present Act, i.e., the Parsi Marriage and Divorce Act, 1936, was

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65A
The expression "Parsi" has no religious connotation. It carries more a territorial and racial connotation.while a 'parsi' is a Zoroastrian, but all Zoroastrian are not parsis.

66
Act XV of 1865.

enacted. In this Act the language and arrangement of the Act of 1865 are adhered to as far as possible.

The provision relating to the validity of the marriage states:[67]

> (i) No marriage shall be valid if the contracting parties are related to each other in any of the degrees of consanguinity or affinity.
>
> (ii) If such marriage is not solemnized according to the Parsi form of ceremony called 'Ashirwad' by a priest in the presence of two Parsi witnesses other than such priest.
>
> (iii) In the case of any Parsi (whether such Parsi has changed his or her religion or domicile or not) who has not completed the age of 21 years, the consent of his or her father or guardian has not been previously given to such marriage.

This Act contains no provisions as to the age at which a Parsi marriage can be validly contracted. Therefore that particular matter ought to be determined in accordance with the general law of Parsis.[68] In case of a marriage of a Parsi who has not completed the age of 21 years, the previous consent of his or her father or guardian is necessary for a valid marriage. A Parsi minor who is over 18 years and under 21 years of

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67 Section 3.

68 Shirinbai v. Khershedji; (1936) 22 Bombay L.R. 430.

age is competent to maintain a suit for breach of promise of marriage, where the contract of marriage has been made by the minor's guardian and on the minor's behalf and for the minor's benefit.[69] A Parsi husband or a wife cannot remarry in the lifetime of his wife or husband until his or her marriage is dissolved by a competent court, although he or she may have become a convert to any other faith.[70]

Every Parsi marriage under the Parsi Marriage and Divorce Act, 1936, shall, immediately on the solemnization thereof, be certified by the officiating priest. The certificate shall be signed by the said priest, the contracting parties, or their fathers or guardians when they shall not have completed the age of 21 years, and two witnesses present at the marriage. The priest will then send the certificate to a registrar who would enter the certificate in a register to be kept by him.

It is to be noted that the certificate required to be given by the officiating priest is not in itself one of the requisites for a valid marriage amongst the Parsis. Where there is no certificate and no entry in the marriage register any other relevant evidence is admissible as proof of the marriage having taken place.[71]

(iv) Jewish Law

There is no statutory law of marriage and divorce applicable to Jewish marriage in India. It is the customary law that is applied. Under these circumstances a few decided cases are given here.

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69 Freny Engineer v. Shapurji Modi (1937) 39 B.L.R. 486.

70 Kumud Desai: "Indian Law of Marriage and Divorce" (Bombay) (1st ed. 1964) at 161.

71 Bai Awabai v. Khodadad, (1936) 22 Bom. L.R. 913.

Among Jews, where there is a "Kaseph Kiddushim", i.e. a betrothal ceremony, which is subject to conditions which are not fulfilled, it is not necessary in order to get rid of the effects of the betrothal, to have a "get" or a formal bill of divorcement.[74]

In order to prove a Jewish marriage it is not sufficient to produce a witness who was present at the religious ceremony in the Synagogue. A written contract (Katuba) between the parties being essential to the validity of the marriage, production and proof of the execution of such documents is necessary.[75]

In the suits for divorce between the Jews, the law to be applied is the Jewish Law, with such adaptations to the circumstances of the case as justice may require. The Jewish in India are monogamous. They cannot lawfully contract a second marriage except in certain cases. Amongst them divorce is allowed on the ground inter alia of adultery or cruelty. A Jewish marriage can be dissolved by the court of the State. As earlier mentioned, it is not longer necessary to have a ritual 'get' or bill of divorcement exercised by the husband. The court can in a proper case among Jews grant a decree nisi for dissolution of marriage. The court has also the power to order permanent alimony in a matrimonial suit between Jews.[76]

It is competent to a Parsi to become a convert to the Jewish faith

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74 Ezekiel v. Reuben, (1945) 33 Bom. L.R. 725.

75 Benjamin v. Benjamin, (1944) 28 Bom. L.R. 324.

76 Ibid.

and to contract a valid marriage with a Jewess according to the Jewish rites.[77] On an application for divorce by a Jewish husband on the ground of adultery of his wife the court has power to make a decree absolute at once.[78]

Thus it is to be noted that the Jews have their own customary law derived from the traditional mosaic law followed in decisions of the courts in India.

[E] THE ENGLISH CONCEPT OF MARRIAGE

The nature and definition of marriage has always been fair game for jurists, philosophers and sociologists.[79] Marriage is not merely a contract. In a passage often since quoted, Brett L.J. said:[80]

> "Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called the status of each. The status of an individual used as a legal term, means the legal position of the individual, in or with regard to the rest of the community. That relation between the parties and that status of each of them with regard to the community, which are constitution upon marriage are not imposed or defined by contract or agreement but by law."

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77 Engel v. Engel, (1944) A.I.R. (Bombay) 15.

78 Jacob v. Jacob, (1948) A.I.R. (Cal.) 90.

79 J. Jackson, "The formation and Annulment of Marriage" (1969) Butterworths).; 128.
See also, Appendix 9 to "The Church and the Law of Nullity of Marriage" (1955), entitled "An Anthropological and Biological Analysis of the Nature, Place and Function of Monogamy in the Institution of Marriage".

80 Niboyet v. Niboyet (1878) P.D. 1, 11.

The classic definition of marriage in English law is that of Lord Penzance in Hyde v. Hyde.[81]

> "Marriage has been well said to be something more than a contract, either religious or civil - to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognized one throughout Christendom: the laws of all Christian nations know about that status, a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What then is the nature of the institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must (however varied in different countries in its minor incidents) have some prevailing identity and universal basis. I conceive that marriage as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others. . . . "

This definition evolves three conditions. First, the marriage must be voluntary. Secondly, it must be for life. Thirdly, it must be monogamous.

[F] HISTORY OF MARRIAGE IN THE WESTERN WORLD

(i) Canon Law

It is perhaps appropriate that some short reference should be made here to the history of marriage in the western world.

Marriage as a social institution goes back deep into history. Roman Law knew it as a legal institution. The canon law of marriage is

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81 (1866), L.R. 1 P & D 130, 133.

based partly on the Roman law, the validity of which the Christian Church recognized, and partly on the Jewish law as modified by the new principles introduced by Christ and his apostles, developed by the fathers of the church and medieval schoolmen and regulated and defined by popes and councils. The most important of these principles was that of the indissolubility of marriage, proclaimed by Christ without qualification according to St. Mark, and with the qualifying clause, "Saving for the cause of fornication," according to St. Mathew.[82]

English Ecclesiastical law is based upon the common law. William I after 1066 separated the spiritual from the lay tribunals and from this time there was a slow but steady process by which the clergy made the marriage law their own special province. Glanvil acknowledged readily that the ecclesiastical court alone had jurisdiction to determine whether or not a marriage had come into existence and the King's court constantly referred to the bishops the question of deciding whether or not a litigant was illegitimate. From this time on, the marriage law of England was that of the canon law, though as yet the church was not equipped with any doctrine of wedlock sufficiently definite to serve as legal theory.[83]

By the sixteenth century, canon law had taken up the idea of marriage as a legal concept, rather than a state of fact. Canon law

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82 Barwick: "The Commonwealth Marriage Act 1961", [1962] 3 Melbourne University Law Review 277 & 281.

83 Barwick: "The Commonwealth Marriage Act 1961", [1962] 3 Melbourne University Law Review 277 & 281.

emphasized the consensual aspect of the contract and before the council of Trent in 1563 no religious ceremony had to be performed; all that was necessary was a declaration by the parties that they took each other as husband and wife, either per verba de praesenti (e.g., "I shall take you as my wife (or husband)"), in which case the marriage was binding immediately, or per verba de futuro (e.g., "I shall take you as my wife (or husband)"), in which case it became binding as soon as it was consummated. The decree of the Council of Trent enacted that, for the future, the presence of a priest was an essential requisite of a valid marriage ceremony. But England had by this time broken with Rome. It became customary in England for the marriage to be solemnized in facie ecclesiae after the publishing of banns (unless this was disposed with by papal or episcopal license) and with the consent of the parents of either party who was under the age of 21. The marriage would then be contracted at the church door per verba de praesenti in the presence of the priest, after which the parties would go into the church itself for the celebration of the nuptial mass.[84]

(ii) Lord Hardwick's Act, 1753

Lord Hardwick's Act, "An act for the better preventing of clandestine

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84 Bromley: "Family Law" (1966, London) at 35:
The marriage service of the Church of England still preserves this ancient form. The first part of the service takes place in the body of the church and consists of the espousals (in which each party replies "I will") followed by the contracting of the marriage per verba de praesenti. This concludes the civil aspect of marriage: the remainder of the service which takes place before the Lord's Table, is purely religious in character.

marriage," was passed in 1753. It enacted that no marriage should be valid until it was solemnized according to the rites of the Church of England in the parish church of one of the parties in the presence of a clergyman and two other witnesses[85] unless a licence had been obtained, banns had been published in the parish churches of both parties for three Sundays. If either party was under the age of 21, parental consent had to be obtained as well. If this was impossible to obtain or was unreasonably withheld, the consent of the Lord Chancellor had to be obtained. If these provisions were not observed, the marriage would in the vast majority of cases be void. Furthermore, the Act abolished the jurisdiction of the Ecclesiastical courts to compel persons to celebrate the marriage in facie ecclesiae if they had contracted a marriage per verba de praesenti or per verba de futuro followed by consummation.[86]

(iii) Marriage Acts 1823 and 1898

Lord Hardwick's Act was repealed by the Marriage Act 1823 for the new law which was so stringent and the consequence of failing to observe it - the avoidance of the marriage - so harsh, that many couples deliberately evaded it by getting married in Scotland. This was particularly the case where one of the parties was an infant and parental consent was withheld.[87] Solemnization in any place other than a

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85 Marriage according to the usage of the Society of Friends (Quakers) and according to Jewish rites were exempt from the provisions of the Act.

86 Bromley: "Family Law" supra note 84 at 37.

87 Ibid. at p. 36.

church or public chapel, unless by special licence of the Archbishop of Canterbury, or without banns, unless a license to do so had been obtained from a person having authority to issue it, was a felony, and the person convicted was liable to transportation to America for fourteen years. Knowingly and wilfully making a false entry was an offence punishable by death, without benefit of clergy.[88]

The Marriage Act 1823 remained in force in England with a number of other Acts, like Marriage Act 1836, Marriage Act 1898, until the marriage law was consolidated by the Marriage Act 1949. Under the Marriage Act 1823, a marriage was void only if both parties knowingly and wilfully enter marriage in any other place than the church wherein the banns ought to be published or without the due publication of banns or the obtaining of the licence, or if they knowingly and wilfully consented to the solemnization of the marriage by a person not in holy orders. In all other cases the marriage was to be valid notwithstanding any breach in the prescribed formalities. But where the marriage of an infant, whose parents or guardians had not given consent, was procured by fraud, the Attorney-General on the relation of the parents or guardians, might sue for the forfeiture of any property acquired as a result of the marriage by the party who had perpetrated the fraud.

The principal criticism raised against the two earlier Act (namely Lord Hardwick's Act, 1753, and the Marriage Act 1823) was that they forced

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88 J. Jackson: "The Formation and Annulment of Marriage: [1969] (Butterworth's) at 279; see also Hambley and Turner: "Cases and Materials on Australian Family Law" (1971 - Sydney) at p. 29.

Roman Catholics and Protestant dissenters[89] to go through a religious form of marriage which might well be repugnant to them. The growing religious toleration during the early years of the nineteenth century eventually led to the removal of this grievance by the Marriage Act of 1836.[90] This Act introduced a new mode of solemnizing a marriage. It enacted that where, by any law or cannon in force before the passing of the Act, any marriage may be solemnized after publication of banns, such marriage may be solemnized in like manner on production of a superintendent registrar's certificate. The giving of notice to the superintendent registrar and the issue of his certificate was to all intents and purposes to stand in the place of the publication of banns and clergymen were empowered to solemnize marriages after such notice and certificate in like manner as after due publication of banns.

The remaining disability under which the Roman Catholics and Protestant dissenters suffered - the necessity of having a registrar present at a religious ceremony - was removed by the Marriage Act of 1898. This Act permitted the trustees or governing body of a registered building to authorize a person to be present at the solemnization of marriages at that building, and henceforth a marriage could be lawfully solemnized there in the presence of an 'authorized person' without a registrar being present at all. Normally, this person would be a minister of the particular denomination, so that the combined effect of the Acts of 1836

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89 Except Quakers who (together with Jews) were still permitted to celebrate their own marriage.

90 Bromley: "Family Law" supra note 84 at p. 38.

and 1898 was to give the ministers of all religious denominations the power of solemnizing marriages already enjoyed by the clergymen of the Church of England.

(iv) Marriage Act 1949

By 1949, a mass of statutes, quite apart from the case law which had grown up as a result of their judicial interpretations, and church Assembly measures governed requirements as to forms and ceremonies. The Marriage Act 1949 corrected, improved upon and consolidated the previous enactments:[91] the Act of 1949 has itself been amended, but not substantially.[92] Very few changes were made in the substantive law. Speaking generally, marriages not celebrated in an authorized mode in a stipulated place by a proper official are void ipso jure. The Attorney-General's power to sue for the forfeiture of property was taken away. The Act does not apply to the Royal family. The Act of 1949[93] sets out the four methods by which marriages according to the rites of the Church of England may be solemnized:

(1) by publication of banns

(2) by special licence granted by the Archbishop of Canterbury or by any person authorized by virtue of an Act of 1533.

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91 12 and 13 Geo. 6, C. 76, which came into force on 1st January 1950, S. 80 (U): 32 statutes and 8 church assembly measures were repealed in whole or in part (5th. Sched.). They still apply to pre-Act marriages. Nothing in the Act of 1949 affects the validity of any marriage solemnized before the commencement: S. 79(5).

92 Registration Service Act 1953, S. 23(1) and 1st Sched; Marriage Act 1949 (Amdt.) Act 1954; Marriage Acts Amendment Act, 1958; Marriage Enabling Act 1960; Marriage (Wales and Monmouthshire) Act 1962.

93 Section 5.

(3) by common licence granted by the appropriate ecclesiastical authorities;

(4) by certificate of a superintendent registrar.

Marriages other than those by the rites of the Church of England may be solemnized:

(1) in district register offices (superintendent registrar's offices);

(2) between parties being both of the Jewish religion, in a Synagogue or private house, according to the useage of the Jews;

(3) between parties each of whom is a member of the Society of Friends, or is in profession with or of the persuasion of that Society, and authorized by its rule to marry according to its usages. The place is not specified.

(4) in the chapels or places of worship of Roman Catholics or Protestant dissenters which are "registered buildings" according to statute.

The following marriages may be solemnized on the authority of a certificate of a superintendent registrar:[94]

(a) A marriage in a registered building according

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94 Marriage Act of 1949, Section 26(1).

to such form and ceremony as the persons to be married see fit to adopt;

(b) A marriage in the office of a superintendent registrar;

(c) A marriage according to the usage of the Society of Friends (the Quakers);

(d) A marriage between two persons proposing the Jewish religion according to the usages of the Jews;

(e) A marriage according to the rites of the Church of England.

The Act of 1949 has since been amended in minor details by a series of Acts,[94A] one of which deserves special mention. The Acts of 1836 and 1898 had left those marrying according to the rites of the Church of England one privilege not shared by others: the power to marry in a private building on the authority of a special licence. This has now been extended by the Marriage (Registrar General's Licence) Act 1970, which permits the Reigstrar General to issue a licence authorizing the solemnization of a marriage anywhere if one of the parties is suffering from a serious illness from which he is not expected to recover and cannot be moved to a register office of registered building. A much

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94A The Marriage Act 1949 (Amendment) Act 1954; the Marriage Acts Amendment Act 1958; the Marriage (Enabling) Act 1960; the Marriage (Wales and Monmouthshire) Act 1962; the Marriage (Registrar General's Licence) Act 1970. These Acts (except for that of 1962) and the Marriage Act 1949 are collectively known as the Marriages Acts 1949-1970.

more important change in the law was the reduction of the age of majority to 18 by the Family Law Reform Act 1969, as a result of which anyone over this age may now marry without the consent of any other person.[94B]

[G] MARRIAGE LAWS IN CANADA

(i) General

Culturally Canada is composed of a variety of societies, each immigrant group carrying with it its own cultural heritage. The customs and cultrue of the numerically predominant group, the Anglo-Saxon, has stamped its imprint upon those of other groups such as the French, Russian, Jewish, East European including Ukrainians, the Scandinavian and Icelandic, the German and Slavic, the Mediterranean people, mostly Italians and Greeks, the people of Commonwealth countries, the Jamaicans and West Indians, the Muslims, Hindus, Parsis, Sikhs and Asiatic Indians, the people of Asia, largely of Japanese and Chinese origin, and the indigenous groups, the Eskimos and American Indians. Each of these groups comes with the cultural environment in which the family unit functions. This cultural environment consits of the customs and conventions, morals, habit of thought and religious beliefs which affect the day to day lives of the individuals composing the family unit. Upon this mosaic has been superimposed the pattern of Canadian 'Laws' relating to the family unit.

In Canada, the lawmakers in the Dominion Parliament (until recently

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94B See Bromley: "Family Law" (Butterworths) (1971 - 4th ed.) at 30.

e.g., the recent enactment of the Canadian Divorce Act) have not been active. As a result, the development of Canadian family law has been such that far from being a source for social welfare it has become the source of social evils and problems related to the family unit. The cause of this unhappy state of affairs may partly be traced to the fact that the law of England was introduced into the provinces of Canada at different times and to different extents, and partly to the constitutional framework of family law in Canada.

The piecemeal settlement and development of Canada by persons of predominantly British ethnic origin has resulted in an uneven patchwork of the laws of England, applicable in various parts of Canada. In the Maritime provinces, the law of England became applicable by the modus operandi of colonization by settlement. In the case of the colony acquired by settlement, the law of England is immediately applicable in the colony and continues in force until the colony acquires a local legislature. The term "Law of England" in the context of family law includes both the common law and the statute law of England, as well as the Ecclesiastical law of England which largely govern matrimonial matters. Hence in the Maritimes, the cut-off dates for the Laws of England which are applicable in each province differ according to the date when the colony became self-governing to the extent of acquiring its own legislature. In the 'western' provinces the cut-off date was established by Act of Parliament since most of these provinces were created by statute after the Dominion of Canada came into existence. This date was fixed by a statute of either the provincial legislature or dominion parliament and the date generally selected for all the Prairie Provinces (but not British Columbia) was 15th July, 1870. In

Ontario, the rule applicable to colonization by settlement resulted in an early cut-off date in 1792, but this was found to be so inconvenient since it included the application of a lot of early 19th century English laws that the date was changed by statute of 1859. Even this later date resulted in problems in the area of family law since it excluded the application of important acts such as the Imperial Divorce and Matrimonial Causes Act 1857 (20 and 21 Vict. Ch. 85) of England so that a special date was statutorily fixed by the Dominion Parliament for Divorce and Nullity Matters in Ontario.

The relevant cut-off dates for the application of the law of England to the nine common law provinces are given below:

Alberta	15th July, 1870
British Columbia	19th November 1858
Manitoba	15th July, 1870
Newfoundland	1st January, 1833
Nova Scotia	2nd October, 1758
Prince Edward Island	7th July, 1773
Saskatchewan	15th July, 1890
Ontario	5th December, 1859 for civil and criminal matters, and 15th July, 1870 for divorce and nullity.

Some of the social problems faced by Canadians living in a 20th Century society are caused by such outdated laws which may have been

suitable for persons composing an English society a century or two ago, but which have been changed in England itself to keep abreast of contemporary needs, but are still being applied in various provinces of Canada. For example, the Imperial Divorce and Matrimonial Causes Act 1857 is applicable wholly in Alberta, British Columbia, Manitoba and Saskatchewan and only partially applicable today in Ontario, which means that matrimonial reliefs such as judicial separation and restitution of conjugal rights are available in the four provinces but not in Ontario, Prince Edward Island and Newfoundland. In Nova Scotia the colonial legislature got around this problem by conferring jurisdiction on the Divorce Court in Nova Scotia which was similar to that under the Act. Likewise Lord Lyndhurst's Act[95] is applicable in Alberta, Manitoba and Ontario, but it is not applicable in other provinces. Prior to the enactment of Lord Lyndhurst's Act, the law of England was that a marriage between persons related within the prohibited degrees of affinity and consanguinity was voidable only, but that statute enacts that such a marriage shall be "absolutely null and void to all intents and purposes whatsoever".[97] Thus, due to the different historical cut-off dates in Canada in provinces such as Alberta, British Columbia, Manitoba, Saskatchewan and Ontario, today, such marriages are void but in Prince Edward Island, Newfoundland, New Brunswick and Nova Scotia such marriages are merely voidable.

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95 The Marriage Act, 1835 (England), 5 and 6 William IV Chapter 54.

96 In re Seidlerand Mackio, (Alberta) (1929) 4 D.L.R. 478
Dejardin v. Dejardin, (Manitoba) (1932) 2 W.W.R. 237.

97 Payne, "Power on Divorce", (1964 - Toronto), 344.

(ii) Legislative Powers of the Dominion and Provinces

The British North America Act 1857 provides for a division of the law-making powers between the Federal Dominion Parliament and the Legislatures of the Provinces. Section 91 of the Act is a general section which indicates the classes of subject with reference to which the Dominion Parliament may enact laws applicable to the whole of Canada. The layouts on the generality of this section are contained in Section 92 which provides for those areas in which the Provincial Legislatures have exclusive law-making power.[98]

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The relevant provisions of Section 91 and 92 are as follows:
"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces and for greater certainty but not so as to restrict the generality of the foregoing terms of this section it is hereby declared that (notwithstanding anything in this act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects hereinafter enumerated:
That is to say:
.....(26) Marriage and Divorce
And any matters coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the province.
Section 92 provides for exclusive of provincial legislatures
"In each province the legislatures may exclusively make laws in relation to matters coming within the classes of subjects hereinafter enumerated;
That is to say:
.....(12) The solemnization of marriage
.....(14) The administration of justice in the province including the constitution maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts.

Under the present division of power, it appears that the Dominion Parliament has power under Section 91 to enact law concerning

(1) Marriage

(2) Divorce

(3) Nullity

(4) Judicial Separation

(5) Restitution of conjugal rights

(6) Jactitation of Marriage

(7) Ancillary orders concerning alimony, maintenance and custody of children insofar as these arise in conjunction with divorce, nullity, judicial separation or restitution of conjugal rights.

The provincial legislatures have law-making powers concerning

(1) Solemnization of marriage

(2) Nullity

(3) All other aspects of family law not specifically provided for by the Dominion Parliament, insofar as such aspects are of concern to the province.

(iii) Legislature of the Dominion and Nine Common Law Provinces

A century ago, the division of power between the Dominion and the provinces provided by Section 91 and 92 of the British North America Act 1876 may have been sufficient for the needs of their time. Section 91(26) of the B.N.A. Act confers powers upon the Dominion Parliament to enact laws concerning marriage and divorce. Section 92 (12-16) gives a residuary power to the provincial legislatures to enact laws concerning the solemnization of marriages within the provinces, civil rights within the province and matters affecting the administration of justice within

the province. Whilst the intention of the draftsman of these sections may have been clear and appropriate to social conditions prevailing over a hundred years ago, today these sections, in view of the interpretation placed upon them, are a fertile source of socio-legal problems. In interpreting these provisions, the family council has held that the inclusive power conferred on the legislatures of the provinces to make laws relating to the solemnization of marriage in the province, operates by way of inception to the powers conferred on the Parliament of Canada as regards marriage; also, that the powers so conferred on the provincial legislatures enables them "to enact conditions as to solemnization which may affect the validity of the contract".[99]

The provincial legislation may be so worded as to affect the validity of marriage and may afford a ground for an action of annulment. The Supreme Court of Canada has accordingly upheld the constitutionality of Ontario and Alberta provincial legislatures rendering the marriage of a minor voidable under certain conditions.[100] In the Attorney General of Alberta and Neilson v. Underwood,[101] Rinfret J., delivering the judgment of the court, said:[102]

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99 In Re Marriage Legislation in Canada, (1912) A.C. 890; 7 D.L.R. 620.

100 Attorney General for Alberta and Neilson v. Underwood, (1934) 4 D.L.R. 167; See also Kerr v. Kerr, (1934) S.C.R. 72.

101 (1934) D.L.R. 167.

102 Ibid.

> "The whole question depends upon the distinction to be made between the formalities of the ceremony of marriage and the status or capacity required to contract marriage is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it. The Statute of Alberta, in its essence deals with those steps and preliminaries in that province. It is only territorial. It applies only to marriage solemnized in Alberta and it prescribes the formalities by which the ceremony of marriage shall be celebrated in that province. It does not pretend to deprive minors domiciled in Alberta of the capacity to marry outside the province without the consent of their parents. Moreover it requires that consent only under certain conditions and it is not directed to the question of personal status."

This statement has been held to apply to the provisions of Section 24 of the Solemnization of Marriage Act,[103] which protects under certain circumstances the solemnization of marriage where either party is under 16 years of age.[104]

It would thus appear that a provincial legislation cannot abolish the right to sue for annulment of marriage, nor enlarge the grounds of annulment except where such enlargement relates to the formalities of the celebration of marriage. This is because the Dominion Parliament has ostensibly an exclusive right to make or amend the law which determines the circumstances in which an action for annulment will lie.[105]

Another source of the socio-legal problems in Canada has been

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103 R.S.A., 1942 Ch. 303, Now. R.S.A., 1970 Chap. 226.

104 Hobson v. Grey, (1958) 25 W.W.R. 82.

105 Payne: "Power on Divorce", (2nd - 1964) (Toronto) at 188.

caused by the sloth of the Dominion Parliament in enacting laws in areas in which it is clearly empowered to do so, others by the activity of the provincial legislatures which have enacted laws in areas which fall either within the sphere of activity of the Dominion or into a no-man's land between the Dominion and the provinces. It needs to be pointed out that the provincial legislatures have evidenced far greater activity in matters concerning the family than has the Dominion which has vested contact with allowing its legislative power to slip from its hands through its own lethargy. The result of such tremendous activity on the part of the provincial legislatures is lack of uniformity of the rights and responsibilities of individuals functioning within the family unit. It is desirable to have uniformity of the laws in this regard in all the provinces of Canada. The large extent to which the nine common law provinces have in fact enacted laws concerning the family under Section 92 of the British North America Act 1867 are indicated below. Only the relevant statutes to this thesis are shown below.

Statutes Enacted by The Dominion Parliament under Section 91, B.N.A. Act

Dissolution and Annulment of Marriage 1963, S.C. Ch. 10

Divorce Act 1967-68, S.C. Ch. 24.

B.C. Divorce Appeals Act, R.S.C. 1952 Ch. 21, Repealed by 1967-68 S.C. Ch. 24.

Divorce Jurisdiction Act R.S.C. 1952 Ch. 84, Repealed by 1967-68 Ch. 24.

Divorce (Ontario) Act, R.S.C. 1952 Ch. 85, partly repealed by 1967-68 Ch. 24.

Marriage Act R.S.C. 1952 Ch. 176, S.C. 1967-68 Ch. 24.

Statutes Enacted by Provincial Legislatures under Section 92.

Alberta (R.S.A. 1970)

Age of Majority Act. S.A. 1970, Ch.

Domestic Relations Act, R.S.A. 1970 Ch.113 as amended

Marriage Act S.A. 1970 Chap. 226 as amended

Seduction Act R.S.A. 1970 Ch. 334

British Columbia (R.S.B.C. 1960)

Age of Majority Act Bill 29 of 1970

Divorce and Matrimonial Causes Act R.S.B.C. 1960 Ch. 118

Marriage Act R.S.B.C. 1960 Ch. 232 as amended

Manitoba (R.S.M. 1970)

Age of Majority Act R.S.M. 1970 Ch. 71

Marriage Act R.S.M. 1970 Ch. M-50

Seduction Act R.S.M. 1970 Ch. S-60

Newfoundland (R.S.N. 1952)

Family Courts Act R.S.N. 1952 No. 118 as amended

Solemnization of Marriage Act R.S.N. 1952 No. 160 as amended

New Brunswick (R.S.N.B. 1952)

Divorce Court Act R.S.N.B. 1952 Ch. 63 amended and partly repealed

Marriage Act R.S.N.B. 1952 Ch. 139 as amended

Nova Scotia (R.S.N.S. 1967)

Nil

Ontario (R.S.O. 1960)

Marriage Act R.S.O. 1960 Ch. 228 as amended

Matrimonial Causes Act R.S.O. 1960 Ch. 232

Seduction Act R.S.O. 1960 Ch. 365

Prince Edward Island (R.S.P.E.I. 1951)

Divorce Court Act S.P.E.I. 1952 Ch. 15

Marriage Act S.P.E.I. 1968 Ch. 36

Seduction Act S.P.E.I. 1876 39 Vic. Ch. 4

Saskatchewan (R.S.S. 1965)

Marriage Act R.S.S. 1965 Ch. 388 as amended

Seduction Act R.S.S. 1965 Ch. 108

Queen's Bench Act R.S.S. 1965 Ch. 85

[H] NECESSITY OF CHANGE IN INDIA

It is submitted that it is necessary to do away with the diversity in the Indian marriage laws. There is no need to have different bodies of law for different sections of people. As envisaged by the Directive Principles in the Constitution of India it is necessary to have a uniform body of rules applicable to all, irrespective of case or creed. This will have the advantage of simplifying the Indian legal system. Another advantage will be that the religious bases of marriage laws will be done away with. In the context of modern socio-economic political philosophy of a socialistic pattern of society in India it is necessary to secularize law and legal institutions.

In the words of Derrett:[106]

> "The laws of the Hindus should be reduced to one comprehensive pattern, so far as may be

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106 Derrett: "Hindu Law Past and Present", (Calcutta) (1957) at 31 and 32.

> possible. No gaps should be left which skill can fill: the future as well as the present should be catered for wherever possible. All of which envisages the eventual enactment of an Indian code which shall embrace all citizens of India."

He further says:

> "A sure instinct begs that legislation should be confined to the bounds of everyday experience and should not include rules of purely speculative or experimental character."

CHAPTER II

CONTRACTS TO MARRY

[A] INTRODUCTION

A marriage is frequently, although by no means invariably, preceded by a contract to marry or "engagement" or 'betrothal' as known in India. As a general rule such contracts are governed by the same rules of law as other contracts but, as a result of their highly personal and uncommercial nature they possess certain peculiar characteristics. Happily actions for breach of promise to marry do not come before the courts in India and Canada very frequently, although many engagements are made in hope only to be dissolved in dissolution. Even in this materialistic age, in most cases the jilted party is prepared to pocket his or her pride rather than provide a sensational journalist with free material. The human interest element in a case of this sort is very great, which presumably accounts for the inordinate amount of space devoted to breach of promise actions in the popular press. It may be that the legal problems involved are of no great practical consequence, but an examination of the topic from the legal standpoint is not without interest.

Thus, it is proposed to examine certain aspects of the subject in the light of the old authorities, taking into account more recent cases which bear on the matter, but it must be at once admitted that there is a paucity of law on the topic.

[B] BETROTHAL OR ENGAGEMENT IN INDIA

Betrothal precedes marriage but unlike marriage it is revocable, so that a girl betrothed to one person may be validly given in marriage to another person though in such a case a suit may be brought for damages

against the father or other guardian of the girl who brought also the contract of marriage. Betrothal according to Hindu law is no more than a promise to marry.[1]

In the case of minors the promise is given by the father or other legal guardian. Where there is a breach of promise the appropriate remedy is not specific performance but damages.[2] When the plaintiff bridegroom dies pending a suit for damages, his legal representative can only recover the out-of-pocket expenses incurred during the betrothal.[3]

Thus marriage is not to be confounded with betrothal. The one is a complete transaction; the other is only a contract.[4] Manu says:[5]

> "Neither ancients nor moderns who were good men have ever given a damsel in marriage after she has been promised to another man."

Marriage brokerage contracts, or contracts for the payment of money, or the conveyance of property, or the doing of any other act on condition of the procurement of a particular marriage, are void, on the ground that it is immoral to allow marriage to be made the subject of mercenary speculation; and under the English law, a bond by the husband

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1 Mulla: "Hindu Law" (Bombay) (13 ed. 1966) at 473.

2 Rambhat v. Limmayya A.I.R. [1892] 16 Bom. 673 (suit for restoration of presents.

3 Balubhai v. Nanabhai [1920] 44 Bom. L.J. 446.

4 Mayne's "Hindu Law and Usage" (Madras) (11th ed. 1933) at 136.

5 Manu, IX, 99.

to the wife's father to induce the latter to consent to the marriage has been held to be in the nature of a marriage brokerage contract.[5A] Therefore, though the Hindu law may allow marriage in the Asura[5B] form, it is very doubtful whether, after the marriage is completed, the father or other guardian of the bride would be entitled to recover from the bridegroom the nuptial fee agreed upon. But Narada and Yajnavalkya both admit the right of the father to annul a betrothal to one suitor, if a better suitor presents himself: and either party to a contract is allowed to withdraw from it, where certain specified defects are discovered.[6] Narada states:[7]

> "A man who withdraws from his contract without proper cause may be compelled to marry the girl even against his will."

But it is now settled by decisions that a contract to marry will not be specifically enforced, and that the remedy, if any, is by an action for damages.[8]

5A Where money is paid to bride's father or guardian in consideration of giving her in marriage.

5B When the bridegroom receives a maiden, after having given as much wealth as he can afford, to the kinsmen and to the bride herself according to his own will that is called Asura rites; See also Chapter III for further details.

6 Narada, XII, 30-38; Yajn., I, 65, 66.

7 Narada XII, 35.

8 Karibassaka v. Karibassoma [1894] 3 Mysore 153. (Among Brahmins in South India, till recent years when the marriage age of girls was raised, betrothal and marriage took place together and consummation of the marriage was later.)

[C] MARRIAGE BROKERAGE

Where the parties to a contract to marry are sui juris, an action for damages for breach of contract by the man or the woman will of course lie. Where the marriage contract is entered into on behalf of minors, courts have generally awarded damages for breach of contract.[9] It is well settled that a marriage brokerage contract or an agreement to remunerate or reward a third person in consideration of negotiating a marriage is contrary to public policy and cannot be enforced.[10]

An agreement to pay a sum of money to a father in consideration of giving his daughter in marriage is equally opposed to public policy and invalid.[11] But a promise to make a gift in consideration of the bridegroom agreeing to marry the daughter of the promisor is valid and enforceable and is not immoral or opposed to public policy.[12] Money paid to a father or brother under an agreement cannot, however, be recovered when once the marriage takes place,[13] but if the marriage is not performed, it can be recovered.[14]

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9 Purushotamdas v. Purushotamdas [1897] 21 Bombay. 23.

10 Umed v. Nagindas [1870] 7 B.N.C.O.C.J., 122 (the agreement being for payment of consideration was invalid as contrary to public policy). Hermann v. Charlesworth [1905] 2 K.B., 123 C.A.

11 Srinivasa Aiyer v. Sesha Aiyer [1918] 41 Mad. 197.

12 Narayanan Nambudiri v. Unnimayya [1945] 1 M.L.J. 145.

13 Dholidas Ishwar v. Fulchand [1898] 22 Bom., 658, 665.

14 Pranmohandas v. Harimohan [1925] 52 Cal. 425.

Thus the rule of Hindu law regarding recovery of money or jewels presented before marriage or of expenses incurred, apart from any question of the parents' betrothal being a valid contract, is certainly enforceable as a rule of justice, equity and good conscience.[15] But, to award damages for breach of contract, except where the parties intending to marry one another are themselves parties to the contract and are competent to contract, appears open to the objection that there can be no enforceable contract to marry on behalf of minor children. As the betrothal is revocable where a better match is available, as the interests of minor children are the paramount consideration, and as the old rule as to detention of an affianced daughter being a punishable offence, is certainly not a rule of law now, the betrothal of parents cannot be held to be binding in any case.[16]

[D] ENGAGEMENT IN CANADA

The Canadian law is the same in this respect as the Indian law, since the principle of English common law applies to both the places to the contract of marriage. The law relating to engagements is important mainly in two types of cases:[17]

(1) Firstly in actions for breach of promise of marriage. In these cases the plaintiff

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15 Mit., II, XI, 28-30.

16 Mayne, "Hindu Law and Usage" supra note 4 at p. 139.

17 E.L. Johnson, "Family Law", Sweet & Maxwell 1958, p. 23.

is almost invariably the woman[18] though there is no reason why a man should not sue a faithless fiancee, and cases in which he has done so are not entirely unknown.[19]

(2) Secondly in actions to recover an engagement ring or presents which may have been given during the engagement. The right to recover the ring will depend on which party broke off the engagement and whether that party had a legal justification for doing so.

An engagement is regarded as a contract, but curiously enough it has never been explicity decided what it is a contract to do, i.e., whether it is merely a contract to go through a ceremony of marriage, or whether it is, in law, an agreement to marry and live together as married people normally do. Thus, if a man were to say to his fiancee, "I am willing to marry you, but immediately after the wedding I shall leave for Australia and I shall never be seeing you again," on the first

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18 She is not necessarily a mercenary "gold digger", for she may have given up a job, bought a trousseau, and gone to other expenses in reliance on the promise of marriage, and thus may suffer serious financial loss if the engagement is broken off. But in addition to any such special damage proved, she is also entitled to damages at large for the loss of the marriage, or "heart balm", as it is popularly termed in the United States.

19 e.g. Harrison v. Cage [1698] 1 Ld. Ray 386; Baddeley v. Mortlock [1816] Holt N. P. 151.

view this would be no breach of contract, as all he agreed to do is to go through a ceremony of marriage, and he is willing to do this; but a dictum in a modern case[20] suggests that an engagement is, in law, what it is normally regarded as socially, i.e., an agreement to get married and live together as husband and wife. It is submitted, therefore, that the woman, under the circumstances supposed, would be entitled to take the view that the man has repudiated his promise to marry her.

A promise made by a married man during the lifetime of his wife to marry some other woman, presumably after his wife's death because he could not do so in her lifetime, was held to be against public policy and morals and could not be enforced.[21]

The parties may promise to marry on a certain date, or on the happening of an event which is certain to happen,[22] or the promise may be conditional on the happening of some uncertain event; in these cases

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20 Kremer v. Ridgway [1949] 1 All E.R. 662. "If it is necessary for my decision (though I doubt it), I would say that, while it is true that this particular type of contract - the exchange of mutual promises to marry ends, so far as legal enforcement is concerned, on the performance of the marriage ceremony, nonetheless the performance which the parties contemplated at the time they exchange mutual promises is not exhausted by the performance of a mere ceremony. I am quite sure that no young woman, when she accepts a proposal of marriage and a contract is formed, would be satisfied if she were told that all the young man is undertaking by the promise is to go through a form or ceremony of mutual promises to become one another's spouses - to become husband and wife with all that that should entail." (Per Hilbery J. at p. 664).

21 Wilson v. Carnley [1908] 1 K.B. 729 (C.A.).

22 Frost v. Knight [1872] L.R. 7 Ex. 111, in which the defendant had promised to marry the plaintiff as soon as his (defendant's) father died.

no action for breach would like until the date had passed or the event had occurred, unless the defendant had formally repudiated the engagement,[23] or had put it outside his power to comply with the agreement by marrying another person.[24]

A promise of marriage which does not stipulate the date or the event on the occurrence of which the marriage is to take place is termed a general promise of marriage, and is construed as a promise to marry within a reasonable time on request.[25] In an action for breach of a general promise of marriage the plaintiff must either prove a request and refusal to fulfill the promise[26] or else show a formal repudiation

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23 Ibid. It was held that the plaintiff could maintain an action for breach, although the defendant's father was still alive. Equally in Donoghue v. Marshall [1875] 32 L.T. 310, where the parties had agreed to marry in May 1875 and the defendant broke the engagement in February 1875, it was held that the plaintiff might sue at once for breach without waiting until May.

24 It might be argued that he has not necessarily done so, because if A in January promises to marry B in December, and in March A marries C, it is possible that C will die before December, and A will then be in a position to marry B. The answer to this is either (1) that an engagement places both parties in a special status, that of betrothal, which comports the existence of the betrothal, so that so doing would be a breach of such duty (this view was adopted by Byles, J. in Frost v. Knight, ante, at p. 118, though it was clearly obiter or (2) that an engagement is an agreement to marry in the state in which the parties are at the time of the agreement. So if A, a bachelor, promises to marry B in December, he cannot fulfill that promise as a widower. This view was expressed by Lord Denman, C.J. in Short v. Stone [1846] 8 O.B. 358, 369; it is submitted that his statement was a part of the ratio decidendi of the case, and that view is to be preferred to that of Byles, J.

25 Harrison v. Case, ante

26 Though the refusal need not be made to the plaintiff; in Gough v. Farr [1827] 2 C. & P. 631, it was held that there was a sufficient request and refusal when the defendant replied "certainly not" to an inquiry from the plaintiff's father whether he intended to fulfill his promise to marry the plaintiff.

of the engagement, the latter being implied when the defendant has married another person.[27]

The parties may include various conditions and terms in their contract, provided that such terms and conditions are legal, it may be possible to sever the legal from the illegal parts of the contract, that is, to hold that there is a valid engagement, but that some part of the agreement is tainted with illegality the whole is treated as a nullity. For example, if it is an express term or condition of the agreement that the parties are to have sexual intercourse before marriage, the whole engagement would be void as tending to immorality and so contrary to public policy.[28]

[E] REMEDIES FOR BREACH OF PROMISE

The only remedies available in an action for breach of promise to marry are damages at common law or indemnity and equity, and restitution in equity of gifts and property etc. given to the other party in view of the promise. Other equitable relief such as specific performance, directing the defendant to marry the plaintiff or injunction forbidding the defendant to marry another, are obviously from the nature of such reliefs, not available for this action.

(i) Damages

Although a breach of promise action is based on a breach of contractual obligation, the principles governing damages are more akin to

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27 Short v. Short, supra note 24 at 372.

28 Spiers v. Hunt [1908] 1 K.B. 720.

those applicable in the law of torts. The leading case on this point in Canada, Lafayette v. Vignon[29] states the principles in which quantum of general damages is calculated as being:

(1) A matter of discretion for the court;

(2) Calculated on a basis of indemnity to the plaintiff for her pecuniary loss;

(3) As compensation for a loss of marriage;

(4) As compensation for injury to her feelings, affections and wounded pride;

(5) The court may also grant special damages.

In Nanjoket v. Bratushes, K.[30] the court stated that granting damages for breach was of the discretion of the court and in exercising this discretion the court may take into account:

(1) The conduct of the parties;

(2) The fact of seduction by the defendant;

(3) The chances of marriage lost by the plaintiff;

(4) Any monetary loss suffered by her naturally resulting from the breach;

(5) The court may also consider the defendant's material resources.

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29 [1928] 2 W.L.R. 506 at 513.

30 [1942] 2 W.W.R. 97.

(ii) Seduction

A woman plaintiff may, and frequently does, plead seduction by the defendant, induced by a promise of marriage, in an attempt to inflate the amount of damages. In India and Canada[31] a charge of seduction may be pleaded in the breach of promise action itself as a method of increasing the quantum of damages. In Canada,[32] a separate cause of action may be taken for a charge of seduction under the Provincial Seduction Acts. If this course is followed damages for seduction may be claimed as a separate head of damage. The exact provision of the statutes differ from province to province,[33] but as a general rule in Canada it is no longer necessary for the father, guardian or employer to bring an action for loss of services. In India and the United Kingdom, only the father, guardian or employer of the plaintiff can bring an action for seduction for it is a tort against a parent to deprive him of services as a result of having sexual intercourse with his daughter. Usually the loss of services will be caused by the daughter's subsequent pregnancies and confinements, but provided some other loss of service follows as a consequences of the defendant's act,

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31 Bessala v. Stern [1876] 2 C.P.D. 265 (U.K.)

32 Ewert v. Tetzloff (1959) 28 W.W.R 124 (B.C.).
Seduction Act, Alberta R.S.A. 1970, Chap. 334.
Seduction Act, Manitoba R.S.M. 1954, Chap. 238.
Seduction Act Ontario R.S.O. 1960, Chap. 365.
Seduction Act Prince Edward Island 1858, 15 Vict. 23, repealed by R.S.P.E.I. 1951, Chap. 23.
Seduction Act Saskatchewan R.S.S. 1965, Chap. 108.

33 There are no such Acts in Newfoundland and Nova Scotia.

as, for example, a nervous breakdown,[34] it is irrelevant whether pregnancy ensues or not. On the other hand, however, it must follow from the nature of the action that if no loss of service can be shown, the mere fact that his daughter has been debauched will not give the parent a cause of action.[35] Moreover the daughter must have been in the service of the plaintiff both at the time of the seduction and at the time when the loss of service occurred, so that, if she is serving another at the time of the seduction, her parent will have to bear the resultant loss without recourse to anyone.

Heavy damages may be awarded to the plaintiff to compensate him for the injury to his feelings, pride and sense of honour. This may be 'illogical' but in the words of Blackburn, J:[36]

> "In form the action is by the master, having the right to the services of a servant and having lost the benefit of those services by reason of the wrongful act of the defendant; but though in form this is the nature of the action, the damage by loss of service is in reality merely nominal; and so long ago as Lord Ellenborough's time... the practice had become inveterate of giving to the parent, or person in loco parentis, damages beyond the mere loss of service in respect of the loss aggravated by the injury to the person seduced. In effect, the damages are given to the plaintiff as standing in the relation of parent, and the action has at present no reference to the relation of master and servant beyond the mere technical point in which it is founded."

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34 Manvell v. Thomson (1826) 2 C. & P. 303.

35 Eager v. Grimwood (1847) I Exch. 61.

36 Terry v. Hutchinson (1868) L.R. 3 Q.B. 599, 602.

Consequently damages have been reduced where the daughter had been unchaste before the defendant seduced her and where the plaintiff was himself unmarried to his daughter's mother.[37]

In Canada, under the Seduction Act, there is a statutory irrebuttable presumption in favor of loss of services, where such a person brings the action.[38] Under the Act it is possible for the seduced person herself to bring the action for damages suffered by herself.[39] This is quite distinct from the action available in the United Kingdom and India to third persons for damages suffered for the loss of the plaintiff's services. It is also possible for the plaintiff in Canada in such an action to claim as separate heads, damages for breach of promise, damages for seduction and maintenance for any child born through the seduction.[40] Damages may also be recovered on the principles of the law of torts for nervous shock resulting in physical illness caused by the breach.

(iii) Special Damages and Exemplary Damages

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37 Verry v. Watkins (1836) L.R. 3 Q.B. 599, 602.

38 Fleming v. Miller (1923) 25 O.W.N. 183, action for seduction by girl's father. Pregnancy prevented her from rendering him daughterly services. The court stated that mere fact of pregnancy was sufficient proof of interference with the girl's ability to render services and it was not necessary to actually prove loss of services.

39 Collard v. Armstrong (1930) 4 W.W.R. 879, the Alberta court stated that in Alberta, the fiction that damages could only be obtained for loss of services by father or employer for seduction was abolished, by the Seduction Act, 1903 Chap. 117, Sec. 8, IInd Schedule. A seduced woman is entitled to bring one in her own name. R.S.A. 1965.

40 Majoket v. Bratussheski (1942) 2 W.W.R. 97.

The Indian[41] and Canadian[42] courts have been willing to grant the plaintiff in a breach of promise action special damages for expenses incurred by her for hospitalization during pregnancy, travel expenses, etc. In some cases the court has considered that the fact of seduction is reason for increasing the amount and awarding the plaintiff exemplary damages.[43]

An unusual example of damages awarded under this head is to be seen in Shaw v. Shaw.[44] In 1937 the plaintiff became engaged to a man who described himself as a widower. They subsequently went through a ceremony of marriage and it was not until after his death intestate 14 years later that she discovered that the marriage was void because unknown to her, his first wife was still alive at the time of his 'marriage' to the plaintiff. She then sued his personal representatives for damages for breach of promise of marriage, alleging a breach of an implied warranty in the contract that he was not already married. It was held that she could recover and that the measure of damages was £1000, the capital sum to which she would have been entitled from his estate had

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41 Gupte: "Hindu Law of Marriage" (Bombay - 1961) at 25.

42 H. v. H. (1947) 2 W.W.R., 695 (Alberta). The plaintiff was awarded $377 special damages for hospitalization during pregnancy.

43 Verboski v. Hunt, [1945] Manitoba Reports 342. The plaintiff was awarded $2500 general and $1000 exemplary damages.

44 (1954) 2 All E.R. 638, C.A. (U.K.)
See also Tscheids v. Tscheidse (1963) 41 D.L.R. 138 (Sask.) Plaintiff was awarded $8000 damages. "No monetary compensation can cure the deceit perpetrated by the defendant."

she in fact had the status of his widow.

(iv) Restitution

The principles which effect the recovery of gifts and property given on the basis of the contract to marry are stated in Seller v. Funk[45] as follows: Gifts and cash given by either party to the other in prospect of marriage may be recovered. Other gifts, e.g., Christmas presents and personal presents - which are not given in contemplation of marriage may not be recovered.

(v) Engagement Ring

When an engagement is broken off, there may be duty to return the engagement ring and other presents which may have been made during the engagement. It is widely believed that the general rule is that if the man breaks off the engagement, the woman can keep the ring, whereas if the woman breaks it off she must return it,[46] but it is submitted that this rule only applies strictly when the engagement is broken off without legal justification; so that if the man breaks it off with justification, he can claim the return of the ring, and if the woman breaks it off with justification, she can keep it.

Where third parties have given gifts to either party to the engagement there is no absolute right of recovery[47] but it would appear

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45 [1914] 32 D.L.R. 99.

46 Jacob v. Davis [1917] 2 K.B. 532.

47 Jeffrey, S. v. Luck [1922] 153, L.T.J. 139 (U.K.).

that on quasi-contractual principles such gifts should be returned to the donor since the conditions precedent for the gift being made (viz: the intended marriage) has failed. In India there is absolutely no doubt that if any present of ornaments has been made by the father or the guardian of the bridegroom to the bride, the same could be recovered by the former if the father of the bride, in breach of the contract, gives away the girl in marriage to another,[48] or if the bride or bridegroom dies before the marriage.[49]

[F] DOWRY UNDER HINDU LAW

The word 'dowry' means any property or valuable security given or agreed to be given between the parties to the marriage, or by any person at, before or after the marriage, as consideration for marriage. It does not include wedding presents unless they are made as consideration for the marriage. It is submitted that a present or payment is in consideration for the marriage if the marriage would not have been arranged by those who arranged it unless the present or payment had been made or promised to be made.

This degrading practice of receiving Varadakshina or dowry owes its origin to ancient times. Marriage, according to Hindu Shastras, is a holy sacrament and the gift of a girl to a suitable person is a sacred duty enjoined upon the father which, if duly performed, is held to confer upon

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48 Girdhar Singh v. Neeladhar Singh (1912) 10 All L.J. 159.

49 Rajendra Bahadur v. Roshan, A.I.R. [1950] All. 92.

him great spiritual benefit. Thus, due to the demand of dowry by the bridegroom, the father fails to perform his sacred duty, if he is poor. One peculiar case of what passed as dowry from the bride's relations to the bridegroom which has great relevance for India may be recalled here. On the occasion of the marriage of the Portuguese Princess Catherine of Braganza with Charles II of England, the island of Bombay, then a Portuguese possession, passed as dowry of that princess to her royal consort. So, but for the fortunate accident of gift of land, the Island of Bombay would have remained to this day in Portuguese possession, a reminder to the doctrinaire politicians[50] and social legislators of the sway of chance and accidents over human affairs.

To remove this evil of dowry, the Dowry Prohibition Act, 1961, was passed on 1st July 1961. This act, which was such a controversial measure and which necessitated a historic joint session of the Parliament as the two Houses could not agree with regard to some of its provisions, has received the assent of the President and has become the law of the land. It prohibits and penalizes the demanding or giving of dowry directly or indirectly, though bona fide gifts out of natural love and affection would be permissible.[51] Punishment for contravention extends up to six months imprisonment and a fine of up to Rs 5,000. Where a dowry is in fact given, the bride herself is entitled to it (for under the maxim 'factum valet' the transfer, though Prohibited, is valid)

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50 Derrett, "Introduction to Modern Hindu Law" (Oxford - 1963) at 145-46.

51 The Dowry Prohibition Act 1961, Section 3 and 4.

the person receiving it must transfer it subject to a penalty for failure so to do, and if she dies before receiving it her heirs are entitled to claim it from the person holding it for the time being. Agreements for giving or taking dowries have been declared void.[52] The offences created by the Acts are non-cognizable, and prosecutions may be instituted only with the consent of the state governments in the case of the offence of demanding dowry. It seems that the bride's creditors or assignee in insolvency, or even a universal donee or a legatee from her, have or has no right to the dowry, for the statute studiously avoids vesting it in the bride herself. It appears that she can, however, assign it, with the holder's assent.

Where, in contravention of the Act, a dowry is paid, and then the marriage fails to be solemnized, the dowry cannot be recovered by way of suit, for it was an illegal contract and the parties are in pari delicto.[53]

The Dowry Prohibition Act is a piece of ambitious social legislation of which we have yet to see the actual impact on society. The question which becomes most pertinent is whether legislation can really alter social behaviour unless the legislation itself represents the awakened conscience and will of society. The avowed object of this statute is undoubtedly the eradication of the social evil of dowry, and whether the statute will achieve its object or not can only be gauged on a consideration of the actual nature of what has been known as dowry in

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52 The Dowry Prohibition Act 1961, Section 5 and 6.

53 Ramekbal v. Harihar A.I.R. [1962] Pat. 343.

society down the ages. In fact, dowry, in one form or another, is as old as the hills and has been in existence in every civilized society though its effects and its implications have been different according to the differences in the organization and structure of the society concerned. The fact, that dowry is the concomitant of what can be said to be arranged marriages and whether amongst princely houses or commoners, whether in Christendom or the Hindu world, arranged marriages have held sway from time immemorial and are prevalent even now. Thus, so long as the institution of arranged marriages remains, dowry will remain disguised in various forms, though the act may have some effect in mitigating some of its worst manifestations. The penal clauses, even though somewhat blunted by safeguards against frivolous complaints, may well instil some fear and sense of restraint in the hearts of rapacious and money-grabbing parents. The present phase of Indian society where the demands for dowries have assumed colossal proportions seem to stem from the severe economic stresses to which the common man, at least so far as the middle classes are concerned, is subjected, to which are added the demands of altered standard of living. It may be questioned, however, whether in spite of concomitant of dowry, arranged marriages are altogether evil, though the alteration of values and the new concept of the importance of women as active participants in every form of social activity and not merely as the presiding spirit of the home and the heart have made it somewhat outmoded. It may be submitted that in the foreseeable future the tempo of the emancipation and economic independence of women will result in marriages settled by the bride and the bridegroom though permission and assent of the elders and those who represent the values of the social background may still be obtained in

many cases. This seems to be the shape of things to come and with the change of social background the evil of dowry may well disappear. The present act, therefore, though it is well meant and may curb some of the demands of unscrupulous parents, may remain more an ornament of the statute book than a weapon used in the field of active litigation.

[G] MARRIAGE SETTLEMENT IN CANADA

(i) Ante Nuptial Settlement

A marriage settlement is a contract which may be made by a third party, viz. a person who is not necessarily a party to the contract to marry such as a father or uncle. It is a contract which consists of transfer of property in view of marriage. It may be made either before or after the marriage takes place, i.e. ante-nuptial or post-nuptial settlements. A concept of marriage settlement may be compared to dowry in India. It is not common in Canada. The property, however, may be settled voluntarily. This type of contract is governed partly by provincial statutes in some provinces[54] and mostly by common law.

Basically there are two types of marriage settlements. In a leading case, Attorney General for Ontario v. Perry,[55] Privy Council distinguished between settlement made by and between the parties to the marriage (e.g. father) (comparable to dowry) as follows:[56]

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54 Marriage Settlement Act, Manitoba R.S.M. 1954, Chap. 155.
Marriage Settlement Act, Sask. R.S.S. 1965, Chap. 339.

55 (1934) 3 W.W.R. 35 (B.C.).

56 Ibid. at 39.

> "There is a clear line of demarcation between two classes of settlement made in consideration of marriage. The first class, a settlement made by a husband on his own marriage for the benefit of his wife and the issue of the marriage, is a settlement which as between the settlors is made for the most valuable consideration imaginable, that of marriage. In other words, the husband's covenant or transfer of property under such a settlement is the price paid by him for the hand of his bride with no element whatever either of gift or bounty involved."

But the second class of settlement (e.g. one made by a father on the marriage of his son or daughter) is a settlement made in consideration of marriage truly enough, but not made in consideration of marriage with the settlor. In this case it is not true to say that the consideration moving to the settlor is 'the highest consideration imaginable'. The so-called consideration of marriage in such a case is based upon results to the settlor totally distinct from those which follow his own marriage. In this second class there is found an element of gift or bounty, but this element of gift is not even latent in the first class of settlement.

Essentially these two types of settlements may be differentiated as follows:

1. Marriage settlement made between the parties to the contract to marry.[57]

   (a) Parties - same as those in marriage contract.

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57 Re Tatlow Trust (1957) 21 W.W.R. 92 (B.C.).

(b) Agreement - to transfer property by one to the other and usually also to their children.

(c) Consideration - the fact of marriage to each other. No element of gifts or bounty.

The husband-to-be usually agrees to settle property on his bride-to-be and their children (if they have any after marriage).

2. Marriage settlement between a third party (e.g. father) and parties to the marriage contract.

(a) Parties - third party, e.g. father and one or both parties to the marriage contract.

(b) Agreement - by third party to settle property on one or both parties to the marriage contract and usually also on their children.

(c) Consideration - quasi-contractual. Element of gift or bounty.

The father (or other third party) of the bride-to-be or the groom agrees to settle property on the engaged-to-be-married couple (and on their children too, usually). The property which is the subject matter of such an agreement is not treated legally as a gift.[58]

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58 Attorney-General for Ontario v. Perry [1934] 3 W.W.R. 35 (B.C.).

(ii) Post Nuptial Settlements

Marriage settlements may be either ante-nuptial (viz. made before the marriage) or post-nuptial (viz. made after the marriage). It is possible for a husband to provide for the future needs of his wife qua wife in a post-nuptial settlement.[59]

The difference between ante-nuptial and post-nuptial marriage settlements as regards their validity depends upon the fact of marriage. An ante-nuptial marriage settlement is a settlement of property made in view of a future marriage. The validity of the ante-nuptial settlement depends upon the parties to the marriage actually contracting a valid marriage at some future date. Thus, if the 'marriage' entered into at a future date is void, then the validity of the marriage settlement is affected.[60] If the marriage is valid (or Semble voidable) the ante-nuptial settlement is validated. By contrast, a post-nuptial settlement is made after the fact of marriage. Parties to the settlement have knowledge of the fact of an existing valid marriage in view of which the settlement is made. If the marriage subsequently turns out to be void, this could affect the settlement. If the marriage is voidable, but the settlement is nevertheless made, there is a presumption that the parties to the settlement had knowledge of the defect in the marriage, but if it can be proved that parties were ignorant of the fact that the marriage was voidable, and the parties

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59 Hicks v. Kennedy [1956] 20 W.W.R. 517 (Alberta).

60 See Jackson: "The Formation and Annulment of Marriage", (Butterworth) [1969 - 2nd ed.] at p. 114-115.

subsequently wanted it annulled, then the marriage settlement would be affected.[61]

(iii) Provincial Legislation

Only two common law provinces, viz. Manitoba and Saskatchewan have statutes concerning marriage settlements. The purpose of the Manitoba Marriage Settlement Act,[62] and the Saskatchewan Marriage Settlement Act,[63] is to prevent fraudulent settlements made with the intention of defrauding the settlor's creditors. The settlement must be in writing and these statutes provide for formalities in the formation of the contract and registration. All the documents must be registered within three months of the date of execution. The statute safeguards both the legitimate claims of creditors and the rights of the wife or person on whom property is settled. Where the settlement is bona fide and registered as required by the statute, the property settled is protected for the wife (or beneficiary) against the claims of the settlor's creditors. If the settlement is not bona fide, or is not registered as required, the statute protects the claims of the settlor's creditors and the creditors may seek recovery and satisfaction of their claims from the property which is the subject of the marriage settlement. The statute also provides for registration of settlement executed outside the

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61 Galloway v. Galloway [1914] 30 T.L.R. 531.

62 R.S.M. 1954, Chap. 155.

63 R.S.S. 1965, Chap. 339.

province.

[H] SUGGESTED REFORMS

(i) Breach of Promise

In the United States the gravest abuses have arisen in the awarding of damages, to which courts have anomalously applied the tort rather than the contract rules of recovery, thereby placing the assessment of damages substantially in the discretion of the jury. Under the tort rules the plaintiff may recover both compensatory and exemplary damages, the latter being based on the defendant's ill behavior or bad motives. In the great majority of cases the plaintiff succeeds in recovering exemplary damages, on what seems to be a presumption that a man who violates his promise is acting maliciously and that a woman who is jilted is invariably insulted or outraged. The danger of oppressive verdicts under the guise of "exemplary", "vindictive", "punitive", or "aggravated" damages, which exist in ordinary actions for intentional wrongs, such as assault, false imprisonment, and gross defamation, is greatly magnified in breach of promise actions through the prominence of various sentimental factors.[64] In summary, in the United States, the action for damages for breach of promise offered a great many opportunities for abuse.[65] Hence, at present an engagement to marry in

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64 Feinsinger, "Legislative Attack on Heart Balm" [1935] 33 Mich. L. Rev. 979.

65 Hence, in U.S.A. there has been in recent years a spate of legislation popularly known as "Heart Balm Laws", which restricts or abolishes the right to maintain or bring an action for damages for breach of promise to marry.

the United States and England[66] has no legal effect and claims for damages for "breach of promise" are abolished.

Whatever may be the position in the United States, it does not follow that the position is the same in Canada or India, nor does it follow that India and Canada should adopt legislation similar to that of the United States or England. It is time that the right to bring an action for breach of promise of marriage be recognized as somewhat antiquarian in the context of social conditions of life in the 20th century in Canada and India. Nevertheless, there may be still some people in India and Canada to whom such a right would be valuable and perhaps such persons should not be denied the right. Since Indian society has diversity in castes and religions, and Canadian society is composed mainly of immigrants of vastly different ethnic backgrounds, it is submitted that a sound case based on social needs may be raised to support the continuation of such a right of action in Canada and India.

(ii) Seduction

As has been pointed out, this branch of the law is sadly in need of reform. The complications and anomalies arise from the fact that English law has never recognized an action for loss of parental rights as such, but has had to adopt another action which has filled the gap imperfectly. Whilst it is founded upon a fiction, the trouble is that

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66 Law Reform (Miscellaneous Provisions) Act, 1970 Section 1(1); "An agreement between two persons to marry one another shall not . . . . have effect as a contract giving rise to legal rights and no action shall be . . . . for breach of such an agreement. . . ."

for that fiction there must be some foundation, however slender, in fact. Consequently the Law Reform Committee in England has recommended that the actions for loss of services, seduction and harbouring should be abolished and that instead a father or mother should be able to recover expenses reasonably incurred as the result of a tortious injury inflicted on a dependant child. This would include medical and nursing expenses, the cost of visiting the child in hospital or elsewhere, and any consequential loss of earnings. The age of the child and the existence of any services should be immaterial. It is submitted that the same reform should be implemented in Canada and India.

As has been pointed out, in Canada under the Seduction Act there is a statutory irrebuttable presumption in favor of loss of services. Where such a person brings the section under the Act it is possible for the seduced person herself to bring the action for damages suffered by herself. This is quite distinct from the action available in the United Kingdom and India to third persons for damages suffered for the loss of the plaintiff's services. It is submitted that such a change should be brought about in the Indian law also, the reason being that the Indian woman till today looks back to the ancient Smritis for her position and is backward compared to the position of the Canadian women, who have gone to the extent of the liberation movement. This would not only give an important right to an Indian woman but would also add to her status in society.

(iii) Marriage Settlements and Dowry

The concept of marriage settlement is unknown to Hindu law. It may perhaps be recommended to the Christian communities in India that the provisions of the Provincial Marriage Settlement Statutes in

Manitoba and Saskatchewan are useful in that they provide protection for both beneficiaries under the settlement and the settlor's creditors.

Since we have yet to see the effect of the Dowry Prohibition Act it is submitted that the penal clauses of the Act should be more strict and the authorities should be on a constant lookout for rapacious and money-grabbing parents. By removing this practice of dowry the Indian law would not only get rid of an evil practice of society but the position of women would considerably increase, since it would give a poor man's daughter an equal right to marry a rich man's son.

CHAPTER THREE

CONTRACT OF MARRIAGE

[A] REQUISITES OF MARRIAGE

The Hindu Marriage Act, 1955, somewhat disingenuously lays down 'conditions' under which marriage may be solemnized between two Hindus. The 'conditions' are in fact of two sorts, as the provisions of the Act plainly show. In the first class come conditions which may be disregarded without risk that the marriage will be void. In the second come those, disregard of which will render the marriage void ab initio. Thus, all the liberal advances of the last century have been retained, though the scheme adopted is such that all marriages celebrated under the Act are for practical purposes Samskara[1] type marriages.[2]

The provision for capacity to marry between the two Hindus are as follows:[3]

(i) Neither party has a spouse living at the time of the marriage;

(ii) Neither party is an idiot or a lunatic at the time of marriage;

(iii) The bridegroom has completed the age of 18 years and the bride the age of 15 years at the time of marriage.

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1 Sacrament (A set of ceremonies performed to accomplish marriage).

2 J.D.M. Derrett, "Hindu Law - Past and Present" (Bombay) (1951) at 94.

3 The Hindu Marriage Act XXV, 1955 Section 5.

(iv) The parties are not within the degrees of prohibited relationship unless the custom and usage governing each of them permits a marriage between the two;

(v) The parties are not Sapindas of each other, unless the custom or usage governing each of them permits a marriage between the two;

(vi) Where the bride has not completed the age of 18 years the consent of her guardian in marriage, if any, has been obtained for the marriage.

In Canada, in order than man and woman may become husband and wife, two conditions must be satisfied: first, they must both possess a capacity to contract a marriage, and secondly, they must observe the necessary formalities. In England and Canada in order that a person should have a capacity to contract a valid marriage, the following conditions must be satisfied:

(a) Neither party must be already married.

(b) Both parties must be over the age of 16 years;

(c) Parties must not be related within the prohibited degrees of consanguinity and affinity.

(d) In England in the case of certain descendants of King George II, the requirement of the Royal Marriage Act, 1772, must be complied with.

This summary of the legal requirements for the formation of the valid marriage, although it is accurate for both England and common law Canada, is deceptively simple for the Canadian situation. The cause of the complexities and confusion which exist in this area of law in Canada in the nine common-law provinces is partly the historical colonial heritage of these provinces and partly the problems created by the Canadian constitution under section 91 and 92 of the British North America Act. In England, power to enact all laws concerning matrimonial matters is vested in parliament. In India it is divided between the central government and the state government. In Canada this power is divided between the Dominion Parliament and provincial legislatures. The British North America Act 1867 provides that general law-making powers over certain areas including "Marriage and Divorce"[4] lies with the Dominion Parliament. Section 92 carves out specific exceptions from the over-all authority. Provincial legislatures have authority to enact laws concerning inter alia

(1) the solemnization of marriage in the province:

(2) the administration of justice, including setting up courts in the province.

Age, physical and mental capacity, consanguinity and affinity are matters which strictly speaking do not come within the ambit of provincial legislatures. Provincial marriage laws dealing with these matters are obliged to be drafted in the forms of provisions affecting solemnization.

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4 B.N.A. Act 1867, 30-31 Vict. Ch. 3, Sec. 91, Ss. 26 (Imperial).

Since the provinces may not legislate regarding the effect of non-compliance of such provisions by invalidating the marriage (rendering it void or voidable) the law of England prevails as regards such matters.

[B] MONOGAMY

(i) Hindu Law

From Vedic times, though monogamy has been the rule, polygamy has, as an exception, existed, side by side. The rules relating to marriage allowed a man more than one wife. But the wife who was first wedded was alone the wife in the fullest sense.[5] Apastamba, says that if a man has a wife, who is willing and able to perform the religious duties and who bears sons, he shall not take a second wife.[6] One text of Manu seems to indicate that there was a time when a second marriage was only allowed to a man after the death of his former wife.[7] Another set of texts lays down special grounds which justify a husband in taking a second wife. It was only when a wife was barren, diseased, or vicious that she could be superseded and a second marriage was valid; as also when she consented.[8] On the suppression of a wife, the husband had to make provision for her. Other passages provide for a plurality of

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5 Vedic Index, I, 478.

6 Apastamba's Codes, II, S. 11, 12-13.

7 "Having thus kindled the sacred fires and performed funeral rites to his wife, who died before him, he may marry again and again light the nuptial fire." Manu; V, 168.

8 Yajn, I, 73; Manu, IX, 77-82.

of wives, even of different classes, without any restrictions.[9]

A peculiar sanctity, however, seems to have been attributed to the first marriage, as being that which was contracted from a sense of duty, and not merely for personal gratification. The first married wife had precedence over the others and her first born son over the half brothers.[10] It is probable that originally the subsequent wives were considered as merely a superior class of concubines like the handmaids of the Jewish patriarchs. Thus it became gradually settled in the courts of British India that a Hindu is without restriction as to the number of his wives, and could marry again without his wives' consent, or any justification.[11] Custom, however, prevented in some cases any second marriage without the consent of the first wife and without making provisions for her.[12] After the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, the first wife became entitled to separate residence and maintenance if the husband married again.

Marriages contracted between Hindus are now made monogamous by statute.[13] Monogamy,[14] introduced by the Hindu Marriage Act, 1955, is

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9 Manu, III 12; VIII 204; IX 85-87.

10 See Manu III 12-14.

11 Thapita v. Thapita (1894) 17 Mad. L.J., 235, 239.

12 See Palaniappa Chettiar v. Alagan Chetti (1921) 48 I.A. 242.

13 The Special Marriage Act (III of 1872), S. 15 and 16.

14 The Hindu Marriage Act 1955 Section 5(1); "Neither party has a spouse living at the time of the marriage."

essentially the voluntary union for life of one man with one woman to the exclusion of all others. Before a valid marriage can be solemnized both parties to such marriage must be either single or divorced or a widow or a widower and then only they are competent to enter into a valid marriage. If at the time of performance of the marriage rites and ceremonies one or other of the parties had a spouse living and the earlier marriage had not already been set aside, the later marriage is no marriage at all. Being in contravention of the conditions laid down in the Hindu Marriage Act, it is void ab initio. The bigamous marriage is non-existent and simply because there is no recourse to the court it cannot be said that it exists unless and until a decree is passed declaring it to be null and void.[15]

This condition of Monogamy in the Hindu Marriage Act, 1955, has been challenged as unconstitutional on more than one occasion. The attack on grounds of religion came before the court in Ram Prasad Seth v. The State of U.P.[16] The appellant had no son and it was found on medical grounds that his wife was incapable of bearing a son. The appellant, however, had a daughter. It was argued that without a son the appellant would not get salvation and that other religious obligations could not be fulfilled in the family. He wanted, therefore, to marry a second wife. The appellant challenged the constitutional validity of the Act on the ground that it violated Article 25[17] of the

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15 William Hudson v. Webster, A.I.R. [1937] Madras 537.

16 [1961], A.I.R., All - 334; see also Bhagwanti v. Sadhu Ram A.I.R. [1961] Punj. 181.

17 which guarantees freedom of religion.

constitution. The learned court rejected the contention and pointed out that under Hindu Law it is not obligatory to marry a second wife if he has no son with the first wife. A son could be adopted and the 'adopted son' was for all purposes as good as a natural born son.

The provision of monogamy was further attacked on the ground of discrimination and that it violates the principlies of morality.[18] On the ground of discrimination (i.e., the Act discriminates between Hindus and Muslims) the court observed that the constitution confers a fundamental right on a citizen as an individual and may be called personal. It means that other qualifications being equal, race and religion will not be a ground of preference or disability. Similarly prohibiting class legislation does not forbid classification on reasonable grounds.[19]

The second objection related to the principle of morality and ethics and it was contended that the Act gives a fillip to prostitution. The census report reveals that in the population of some of the places, the number of females is more than males. Accordingly if a man is restricted to one wife only the excess number of females could not hope to get married and satisfy their biological needs in lawful wedlock with the result that such a situation was bound to lead to immorality and traffic in human beings, against which the constitution has set its

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18 Haisnam Baruntitoni Singh v. T.N.H. Bhani Devi, [1959] A.I.R. Mad. 59.

19 State of Bombay v. Narasu Appamati, A.I.R. [1952] Bom. 84; "To insist on monogamy is a social reform and thus the state is entitled to legislate."

face. The court could not accept this view. It was observed that it is not always necessary that a woman who cannot get married must become a prostitute.

The court stated:

> "Morality is not always connected with physique and one thing evolution through the ages had done to mankind is to bring under greater control the physical aspect of matters and to subordinate it to the mind. If it were not so we could not find unchaste married women and chaste widows or unmarried. It cannot therefore be asserted that marriage is the panacea for all moral evils."

Thus the idea of having several wives at the same time is now repugnant to a person of education and culture. Society changes from time to time and with it change moral values and laws. The provision of monogamy in the Hindu Marriage Act is an instance of a utilitarian law based on the theory of greatest good to the greatest number. It is, therefore, not necessary that this Act may be advantageous to everyone. Thus it is not discriminatory in nature nor does it violate the principles of ethics and morality.[20]

(ii) Canadian Law

The classic definition of marriage in English law is propounded by Lord Penzance in Hyde v. Hyde:[21]

> "I conceive that marriage, as understood

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20 B.S. Sinha: "The Hindu Marriage Act 1955: an Experiment in Social Legislation", [1968] S.C. J. Vol. 8 at 31.

21 [1866] L.R. IP. & D. 130, 133.

> in Christendom, may ..... be defined as the voluntary union for life of one man and one woman to the exclusion of all others."

It means that marriage by English law must be monogamous and that neither party may contract another marriage as long as the original union subsists. If a person has already contracted one marriage, he cannot contract another until the first spouse dies or the first marriage is annulled or dissolved.[22] Canada is part of the tradition of western civilization and has always recognized marriage as monogamous and for life.[23]

The Dominion Parliament has dealt with the question of bigamy in the Criminal Code.[24] Sections 240-245 provide that bigamy is a criminal offence in Canada. The offence is committed by a person undergoing a marriage ceremony in Canada with another person when he or the other person is already validly married or by marrying two persons on the same day or by a person who is a Canadian citizen resident in Canada going out of Canada to do any of these prohibited things. Bigamy is a criminal offence under Section 240 and 241. Procuring a feigned marriage is also an offence. Section 243 makes polygamy also an offence.

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22 But this does not apply if the first marriage was void: see Bromley, "Family Law" (Butterworth) (1966 - 3rd ed.) at 32.

23 "Proceedings of the special Joint Committee of the Senate and House of Commons on Divorce", No. (1), final report 1967, Ottawa, p. 41.

24 1953-54 Stats. Can. Ch. 51, as amended up to 1970.

In the provincial legislation an attempt is made to enforce this requirement by a provision in the Marriage Acts of most provinces that parties must state they do not know of any legal impediment to the marriage; a prior existing marriage would be a legal impediment.

The question has sometimes arisen whether a person whose spouse has been missing for a number of years may validly enter into a marriage union with another person. The Criminal Code provides by Section 240 that a person does not commit bigamy by going through a marriage ceremony with another person even though he or she is married, if he or she believes bona fide and on reasonable ground that his or her spouse is dead or if the spouse has been continuously missing for 7 years and he or she did not know that the spouse was alive during that 7 years.

Thus, a person who is absent or missing for seven years, in effect, sets the other spouse free to remarry in Canada provided that the latter is not aware at any time that the spouse is alive at any time during those seven years.

The provincial statutes[25] have also attempted to provide for a time period during which a spouse is free to remarry after obtaining a

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See Marriage Acts
Alberta: Sec. 20: Court decree for presumption of death of spouse after 7 years of absence. (R.S.A., 1971, Chap. 226).
British Columbia: Section 51: See also Survivorship and Presumption of Death Act.
Manitoba: R.S.M. 1954, Ch. 154, Section 25.
New Brunswick: R.S.N.B. 1952, Chapter 139, nil.
Newfoundland: R.S.N. 1952, Chap. 160, nil.
Nova Scotia: R.S.N.S. 1967, Chapter 287, nil.
Ontario: R.S.O. 1960, Chap. 228, Section 11.
Prince Edward Island: R.S.P.E.I. 1969, Chapter 27, Section 21.
Saskatchewan: R.S.S. 1965, Chapter 338, Section 29.

a certificate or court order to that effect.

[C] CONSANGUINITY AND AFFINITY

(i) Hindu Law

Most, if not all, civilized states prohibit certain marriages as incestuous. The prohibited relationship may arise fron consanguinity (i.e. blood relationship) or from affinity (i.e. relationship by marriage). The degrees within which a man or a woman may marry is a matter affecting that individual's personality. But public policy in relation to incest is also involved, and marriages within the prohibited degrees have been described as "contrary to religion, morality, or to any of its fundamental institutions."

In the early ages, the prohibition against marriages within the gotra (Agnatic lineage) or within certain degrees of kinship which are now so familiar were probably not firmly established. From the Satapatha Brahmana, for instance, it appears that the prohibition extended only to the third or fourth degree.[26] But by the time of the Grihya Sutras, the rule had come into force that a man should take for his wife one who is not of the same gotra (Agnatic lineage) or who is not a Sapinda (Agnatic or Cognate who share in the Ricebowl) of his mother.[27] According to Gautama and Vasistha, (ancient writers) the prohibited degrees were four on the mother's side and six on the father's side.[28] All these

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26 Satap Brah., I, 8, 3, 6; Vedic Index I, 475.

27 Hiranyakesin, I, 19.2;

28 Vishnu XXIV, 10; Yajn, I, 52, 53; Narada, XII, 7.

writers add the restriction that the bride and the bridegroom must not be of the same gotra or Parvara. The difference in the statement of the rule was evidently due to the fact that the reckoning was, in the former case, exclusive, and in the latter inclusive of the bride or bridegroom.[29] It is thought by some that the rule is based upon physical grounds, and that it is meant to prevent that physical degeneracy of the race which marriage between near relations would lead to. That may be true. But there is a still strong reason for the rule: it is intended to prevent moral degeneracy and consequent social evils which would otherwise result. These have been so forcibly pointed out by Bentham[30] that it is necessary to quote his words:

> "If there were not an insurmountable barrier between near relatives called to live together in the greatest intimacy, this conduct, continual opportunities, friendship itself and its innocent caresses might kindle fatal passions. The Family - that retreat where repose ought to be found in the bosom of order, and where the movements of the soul, agitated by the scenes of the world ought to grow calm..... would itself become a prey to all the inquietudes of rivalry, and to all the furies of passion. Suspicions would banish confidence - the tenderest sentiments of the heart would be quenched - eternal enmities of vengeance, of which the bare idea is fearful, would take their place. The belief in the chastity of young girls, that powerful attraction to marriage, would have no foundation to rest upon: and the most

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29 Mayne, "Hindu Law and Usage", (Higgimbotham) (1953 - 13 ed.) at 151.

30 "Principles of Civil Code", Part III, Chap. V, Sec. 1.

> dangerous snakes would be spread for youth in the very asylum where it could least escape them."

Thus it is submitted that the bearing of these remarks upon the state of Hindu society, at the time when the rules in question were framed, is evident. The Hindus in those days and many of them even now, live in joint families and under the same roof for generations together and their remote collaterals (of course on the paternal side only) were brought into contract in the same way as brothers and sisters in modern society. The prohibition of marriage between remote collaterals was not therefore, as unnecessary as it may now seem to be. The rule when once established for the paternal side, was extended to the maternal side by analogy.

The difficulty of Gotra is, however, of no practical importance now because of the Hindu Marriage Act.[31] which inter alia provides that no marriage solemnized between Hindus before the commencement of the Act, which is otherwise valid shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belong to the same gotra.

The Hindu Marriage Act enacts[32] that no marriage is valid if it is made between parties who are related to each other as 'sapindas' unless such marriage is sanctioned by usage or custom governing both the parties.

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31 The Hindu Marriage Act 1955, Section 29(1).

32 Section 5, clause (v).

The Act further defines[33] 'Sapinda Relationship' by laying down the manner of computing degrees of ascent and relationship for the purpose of marriage.

Under the old law, Sapinda Relationship was of primary importance in matters of succession to the property of a male Hindu and 'Sapindas' belonged to the first class of heirs. The different classes of heirs recognized by the different schools of Hindu law have now ceased to exist in case of devolution of property of a male Hindu and the new scheme of succession evolved by the Hindu Succession Act 1955, does not proceed with Sapinda relationship as the indispensible starting point.

The general rule, therefore, is that no valid marriage can take place between two persons who are sapindas of each other. Thus the general provisions of the present Hindu Law rules that:

(1) Sapinda relationship extends as far as the third generation in the line of ascent through the mother in case of both the parties.

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33 Section 3, clause (f):
(i) 'Sapinda Relationship' with reference to any persons extends as far as the third generation (inclusive) in the line of the ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traved upwards in each case from the person concerned, who is to be counted as first generation.
(ii) Two persons are said to be 'sapindas' of each other if one is a lineal ascendent of the other within the limits of Sapinda Relationship, or if they have a common lineal ascendent who is within the limits of Sapinda Relationship with reference to each of them.

(2) Sapinda relationship extends as far as the fifth generation in the line of ascent through the father in case of both the parties.

(3) Sapinda relationship may subsist in case of both parties through the father or in case of both through the mother; or it may subsist in case of one of them through the father and in case of the other through the mother.

(4) The line is traced upwards in case of both the parties counting each of them as the first generation; the generations in the line of ascent whether three or five are to be counted inclusive of the persons concerned and the common ancestor or ancestors.

(5) Sapinda relationship includes relationship by half or uterine blood as well as by full blood and also by adoptions. It also includes both legitimate and illegiatime blood relationship.

Thus there are two categories of Sapindas:[34]

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34 S.V. Gupta, "Hindu Law of Marriage", (Bombay) (1961) at p. 97.

(1) A lineal ascendant within the limits of sapinda relationship, and

(2) Persons having common lineal ascendant within those limits.

Under the first category the male sapindas would be:

Father
Father's father
Father's father's father
Father's father's father's father
Mother's father
Father's mother's father
Father's mother's father's father
Father's father's mother's father
Father's mother's mother's father
Son
Son's son
Son's son's son
Son's son's son's son
Daughter's son

and the female sapindas would be:

Mother
Mother's mother
Father's mother
Father's father's mother
Father's father's father's mother
Father's mother's father's mother
Father's mother's mother
Father's mother's mother
Daughter
Daughter's daughter
Son's daughter
Son's son's daughter
Son's son's son's daughter

Under the second category, two persons are sapindas of each other if their common lineal ascendant is within the limits of sapinda relationship, that is within the fifth degree through his or her immediate male ascendant and within the third degree through his or her immediate female ascendant.

(ii) Canadian Law

The English law before the Reformation adopted the canon law but one of the results of the break with the Roman Catholic Church was the adoption of a slightly modified table of prohibited degrees. But there was eventually little doubt that the prohibited degrees were those laid down by Archbishop Parker in 1563 and adopted in 1603 in the ninety-ninth canon and set out in the Book of Common Prayer.[35] Up till 1835 a marriage within the prohibited degree was voidable merely, but the Marriage Act of that year made all such marriages void. By the end of the last century wide dissatisfaction was being expressed against the stringent rules relating to affinity, though it was only after bitter controversy that the Deceased Wife's Sister Marriage Act was passed in 1907 permitting a man to marry his deceased wife's sister and it was not till 1921 that he was allowed by statute to marry his deceased brother's widow.[36] The degrees of relationship prohibited today are set out in the first schedule to the Marriage Act of 1949, as amended by the Marriage (Enabling) Act 1960. The schedule in fact reproduces as Bishop Parker's table as amended by the four acts passed between 1907 and 1960.

In Canada in this area of the law relating to capacity to marriage, the Dominion Parliament has enacted its sole statute relating to marriage. The Marriage and Divorce Act 1925,[37] provides that a marriage

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35 Hill v. Good (1670), Vaugh. 302, 328.

36 Deceased Brother's Widow's Marriage Act, 1921.

37 R.S.C. 1952 Chap. 176, Sec. 2 & 3, i.e., daughter of a sister, son of a brother.

by a man to his deceased wife's sister or niece and by a woman to her deceased husband's brother is not invalid for affinity.[38] Apart from this Dominion Parliament enactment of the law relating to affinity and consanguinity[39] in the provinces is the common law of England, stated in Archbishop Parker's table of 1563 and contained in the Book of Common Prayer of the Church of England. This table prohibits marriage of persons related in the first, second and third degrees. The method of determining degrees of relationship is by counting up from one party to the marriage to the common ancestor to the other party. Archbishop Parker's table of 1563 was impliedly accepted as part of the common law by Lord Lyndhurst's Act[40] which provided that all marriages celebrated after 1835 between persons within certain prohibited degrees of relationship were null and void.

The prohibited degrees of relationship contained in Archbishop Parker's table included relationship by half-blood. The Table is reproduced below:[40A]

PROHIBITED DEGREES OF AFFINITY & CONSANGUINITY

ARCHBISHOP PARKER'S TABLES, 1563 - ANNOTATED

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38 Affinity means relationship by marriage.

39 Consanguinity means relationship by blood.

40 1835, 5 and 6 Bill. 4 Ch. 54, Sec. 2.

40A Smith and Guttman: "Cases and Materials on Domestic Relations", (University of Alberta) (1962) at 118.

A MAN MAY NOT MARRY HIS:	A WOMAN MAY NOT MARRY HER:
1. father's mother	1. father's father
2. mother's mother	2. mother's father
3. father's father's wife	3. father's mother's husband
4. mother's father's wife	4. mother's mother's husband
5. wife's mother's mother	5. husband's mother's father
6. wife's father's mother	6. husband's father's father
7. father's sister	7. father's brother
8. mother's sister	8. mother's brother
9. father's brother's wife	9. father's sister's husband
10. mother's brother's wife	10. mother's sister's husband
11. wife's father's sister	11. husband's father's brother
12. wife's mother's sister	12. husband's mother's brother
13. mother	13. father
14. father's wife	14. mother's husband
15. wife's mother	15. husband's father
16. daughter	16. son
17. wife's daughter	17. husband's son
18. son's wife	18. daughter's husband
19. sister	19. brother
20. wife's sister	20. husband's brother
21. brother's wife	21. sister's husband
22. son's daughter	22. son's son
23. daughter's daughter	23. daughter's son
24. son's son's wife	24. son's daughter's husband
25. daughter's son's wife	25. daughter's daughter's husband
26. wife's son's daughter	26. husband's son's son

A MAN MAY NOT MARRY HIS:	A WOMAN MAY NOT MARRY HER:
27. wife's daughter's daughter	27. husband's daughter's son
28. brother's daughter	28. brother's son
29. sister's daughter	29. sister's son
30. brother's son's wife	30. brother's daughter's husband
31. sister's son's wife	31. sister's daughter's husband
32. wife's brother's daughter	32. husband's brother's son
33. wife's sister's daughter	33. husband's sister's son

It should be noted that the Lord Lyndhurst Act does not apply to Quakers, Doukhobors, Eskimos, Indians, and other non-Christian denominations. The prohibited degree of relationship for such persons depends upon some law other than Lord Lyndhurst's Act.

Lord Lyndhurst's Act is not applicable in New Brunswick, Nova Scota and Prince Edward Island. In Nova Scotia and Prince Edward Island the prohibited degrees of relationship are those stated in English Statute Henry VIII, 32 Henry VIII, 38 by their provisional statutes.[41] Since both Archbishop Parker's Table and the Statute of Henry VIII are based on the biblical levitical degrees, these two provisions are generally similar although Archbishop Parker's Table is more explicit than the Statute of Henry VIII.

Today the Canadian society is composed of people of Asiatic, East

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41
Act of 1758, 17 Geo. 1 Ch. 17 (Nova Scotia).
Act of 1835, 5 Win. 4 Ch. 10 (Prince Edward Island).
Act of 1791, 31 Geo. 5 Ch. 12 (New Brunswick)

and West European, Scandinavian and many different ethnic backgrounds. Canadian society is therefore a rich mixture of personal law, ethnic and religious customs pertaining to marriage. It is probable that the people in Canada have never heard of Archbishop Parker or his table and even if they have they would probably have dismissed it as being irrelevant especially to Asiatic and Jewish and other ethnic groups, being something found in a prayer book in the Church of England. Even in England, the relationship in Archbishop Parker's table have already been modified by the church and at present barely fifteen or half the number are observed. It might be argued that in India the prohibited degree is very wide. The concept of joint family is breaking down and the emphasis is on individual units. The words of Bentham though throw a great light on the ancient position but they are not up to date and thus the mere idea of having so many prohibited degrees is losing ground because of the existence of individual units.

The Indian law in relation to the adopted child's marriage is the same as Canadian law, i.e., though adoption has the effect of removing the adopted child from the natural family into the adoptive family, it does not sever the tie of blood in the family of birth in the matter of marriage. The adoptee, despite the severance of all the ties in the natural family, cannot marry any person whom he or she could not have married in the family of his or her birth. It may be noted that both the child and his adopting parents may be, and frequently are, unaware of the identity of the child's natural parents; likewise the child's natural parents may be, and frequently are, unaware of the identity of the adopting parents and lose all trace of the child itself. In the result, the child may in adult life meet and marry a person within the

prohibited degrees of relationship and perhaps discover accidentally that his or her marriage is void. It is impossible to say whether, and if so how frequently, there occur these consequences of adoption. Insofar as they do occur, they appear to raise an insoluble problem to which no answer at present can be seen.[42]

The question whether the existing prohibited degrees of relationship are adequate or whether they should be altered is partly biological and partly social and moral. The answer to this must depend upon public opinion. Would public opinion tolerate or object to marriages between uncle and niece or nephew and aunt and if it objects to such unions, does it wish to extend the prohibition to great-uncle and great-niece and great nephew and great-aunt?

It is submitted for India and Canada, therefore, that the prohibited degrees should be curtailed and reduced to a minimum. It may be proposed as follows:

> No person may be married to any other person within the following prohibited relationships of the whole or half blood:
>
> <u>For a man</u>: A man may not marry his
>
> (1) grandmother
> (2) mother
> (3) sister
> (4) daughter
> (5) granddaughter

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42 The Law Commission, "<u>Family Law, Nullity of Marriage</u>", at p. 7.

For a woman: A woman may not marry her

(1) grandfather
(2) father
(3) brother
(4) son
(5) grandson

Five relations stated above are the minimum number. Relationship by marriage (affinity) should not be prohibited. Medically and scientifically there is no reason to prohibit such relationship.

[D] AGE

(i) Hindu Law

Marriage, while bringing physical intimacy between two individuals, effects an important change in the legal and social status of parties. Consequently, every system of law requires that the parties should have attained sufficient age to be capable of a physical union as well as to raise the presumption that they understand the nature of the status and the obligations attached to it. Marriages of persons of non-age, quite apart from being deleterious to the health of the parties, have created numerous social problems. Though economic factors have influenced the practice, it is indeed the price Indian society has to pay for preservation of pre-marital chastity, a theme that has been nurtured from ancient times. Further, the practice received positive encouragement from the institution of joint family which relieved the child spouse of any physical or economic responsibility.[43]

According to Hindu sages the marriageable age of a man was between

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43 B.N. Sampath, "Marriageable Age, Consent and Soundness of Mind in Indian Matrimonial Law: A Plea for Rationalization", (1969) Benaras Law Journal, 29.

twenty-four and thirty years and that of a girl between eight and twelve years. As Manu said,[44]

> "Let a man of thirty years marry an agreeable girl of twelve years, or a man of thrice eight years a girl of eight years, one marrying earlier deviates from duty."

In the words of Yama:[45]

> "If a girl be not given in marriage when she has reached the twelfth year, her mother and father as well as her elder brother, these three go to the infernal regions."

While the Hindu sages enjoyed early marriage of females, they condemned in the strongest terms the premature consummation of marriage.

The Child Marriage Restraint Act, 1929, was passed which introduced certain changes. Under the Act, commonly known as the Sarada Act,[46] the marriage of a boy below 14 years was restricted and the violation of it was made as a penal offence. The Act was regarded in those days as a revolutionary social measure and the people condemned the haste with which the Act had been passed. Thousands of early marriage took place in a hurry during those days all over India to avoid the penalty imposed by the act.[47] Then came the Special Marriage Act 1954 that fixed the age of the female to be 18 years and the male to be 21 years before there could be any marriage under that Act.

The Hindu Marriage Act 1955 provides[48] that a marriage may be

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44 Manu's Codes, IX - 94.

45 Yama's Codes; 22 - 23.

46 This Act is called after the name of its sponsor.

47 Age of Marriage (1969) S.C.A. 26.

48 Section 5 (iii).

solemnized between any two Hindus if the bridegroom has completed the age of 18 years and the bride 15 years at the time of the marriage. The Act adopts the completion of a particular age at the time of marriage as the test of capacity. It provides[49] that anyone who procures a marriage of himself or herself to be solemnized under the Act in contravention of this provision may be punished with simple imprisonment for up to 15 days or a fine up to Rs 1000/- or with both. The Child Marriage Restraints Act, 1929-49[50] provides that if a male under 21 years of age marries a child (i.e., a female under 15 years) he is punishable as provided by the Hindu Marriage Act above. Whosoever performs, conducts or directs a child marriage is punishable similarly unless he proves that he had reason to believe that the marriage was not a child marriage, i.e., that both parties were above the minimum age. Promoting the child marriage whether as a parent or guardian or otherwise, permitting it to be solemnized, are similar punishable offences. But mere attendance at a child marriage is not punishable.[51] And the marriage, notwithstanding the penal provisions, was valid irrespective of the provision of the Child Marriage Restraint Act,[52] and a marriage in disregard of the corresponding provisions of the

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49 The Child Marriage Restraint Act 1929, Section 18.

50 Act 19 of 1929; Act 19 of 1938; Act 41 of 1949; The Central Act is supplemented in Assam by Assam Act 27 of 1948, S-45, and there are numerous state statutes which copy the provisions of the Central British Indian Statute.

51 Emp. v. Fulabai, A.I.R. [1940] Bom. 363.

52 Rau v. Sital, A.I.R. [1939] All. 340.

Hindu Marriage Act will be valid also.[53]

The idea of putting two different age limits in two acts (Special Marriage Act 1954 and Hindu Marriage Act 1955) is not clear but it is submitted that the legislature obviously thought that those who would be contracting a marriage under the Special Marriage Act 1954 should be aware of the consequences of such a marriage. The Child Marriage Restraint Act 1929 has been on the statute book for over 42 years and the number of prosecutions initiated under the act is infinistesimal as compared to the number of child marriages that have taken place during this period. It is submitted that an effective implementation of the Child Marriage Restraint Act 1929 is a precursory requirement for any further legal reform.

Another measure, namely, the registration of marriages provided under the Hindu Marriage Act 1955[54] which would have discouraged the practice of child marriage, in an indirect way has been unceremoniously ignored. Registration of marriages would obviously require the parties or their parents to furnish all the details including the age of the parties to the concerned authority. Indeed, obligatory registration would ensure compliance with the provisions of the Child Marriage Restraint Act, for the parents would think twice before arranging the marriage of their children, and this would also enable the authorities to prosecute them for non-compliance with the provisions of the Act.

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53 B. Sivanandy v. P. Bhagavathyamma, A.I.R. [1962] Mad. 400.

54 The Hindu Marriage Act 1955, Section 8.

(ii) Canadian Law

Provincial legislatures have no authority to prescribe a minimum age below which a party may not be married. Because of this, the common law is applicable where minimum age qualifications are concerned. English canon law provided that the age of rational consent below which marriage was impossible was seven years for both boys and girls. A marriage performed when either party was below seven years was void. Over seven years and before either party had reached an age when it could be consummated, the marriage remained voidable at the option of the parties, if it had not been consummated. Later in the middle ages, the ecclesiastical courts[55] developed a presumption of canon law[56] that the age before a marriage could be consummated was 14 years for boys and 12 years for girls. This presumption was accepted into common law, and in England until 1929[57] the minimum age for marriage was 12 years for girls and 14 years for boys.

Provincial legislation of Canada on this topic shows that there is a wide range between the minimum age for marriage from province to province under enactments in which the provincial legislatures have attempted to specify a minimum age. It must be noted that such attempts to prescribe a minimum age for marriage are ultra vires the authority of the provinces and that the common law of England still remains applicable in these provinces, so that a marriage celebrated between a 12 year old

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55 See Jackson, "The Formation and Annulment of Marriage," (1959 - 2nd ed.) (London), at 26.

56 Bracton, J; 92 Fitz. Abr. Tit. Dower P. 1172 (VI3 Ed. 11).

57 Age of Marriage Act, 1929 (19 and 20 Geo. 5 C-36).

girl and a 14 year old boy is not a nullity in any province.

The Provincial Statutes of Alberta,[58] British Columbia,[59] and Prince Edward Island,[60] attempt to provide a minimum age for both boys and girls is 16 years. An exception to this rule is provided in the statutes of Alberta and British Columbia for pregnant girls to prevent illegitimate children. The exception in the British Columbia statute is wider than the exception concerning (merely) pregnant girls because a county court or a supreme court judge has a discretion to authorize solemnization of marriage or issue of a licence when it is expedient or in the interest of the parties to get married at a younger age. In Alberta and Prince Edward Island between the ages of 16 and 18 years the consent of certain persons is required for a marriage licence to be issued. Over 18 years of age parties have full capacity to marry. In British Columbia, between the ages of 16 and 19 years, consent of certain persons is required before a marriage is solemnized or a licence issued. Over 19 years of age parties have full capacity to marry. It should be noted that a marriage of a 12 year old girl and a 14 year old boy solemnized without judicial authorization would not be void in British Columbia since its validity is expressly saved by the statute. Further, it is expressly provided[61] that, notwithstanding these requirements, a

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58 Marriage Act R.S.A. 1970 Chap. 226, Sec. 16, 17, 18.

59 Marriage Act R.S.B.C. 1960 Chap. 232, Sec. 29, 30, 31.

60 Solemnization of Marriage Act 1969, Chap. 27, Sec. 17 & 18.

61 The Marriage Act, R.S.B.C. 1960, Chap. 232, Sec. 31.

marriage is not invalidated if these requirements are not fulfilled.

The Marriage Act of Ontario[62] provides a minimum age of both boys and girls as 14 years, and Saskatchewan[63] provides a minimum age of 15 years, Manitoba[64] provides a minimum age of 18 years. In these provinces no person may issue a licence or permit, or solemnize a marriage of anyone under this minimum age. An exception to this rule is provided for pregnant girls in order to prevent illegitimate children, in Saskatchewan and Ontario. In Manitoba, there is no saving exception for the pregnant girls in the 1970 statute but the judge has discretion to give consent. In Ontario and Manitoba persons over 18 years of age have full capacity to marry. In Saskatchewan persons over 19 years of age have full capacity to marry.

The Provincial Statutes of New Brunswick[65] and Nova Scotia[66] do not provide any minimum age for marriage. In the absence of any sub-section the common law provision of the minimum age of 12 years for girls and 14 years for boys prevails and in New Brunswick and Nova Scotia the parties have full capacity to marry over the age of 18 years. Under the age of

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62 The Marriage Act R.S.O. 1960, Chap. 228, Sec. 8.

63 Solemnization of Marriage Act, R.S.S. 1968, Chap. 338, Sec. 31, 38, 39.

64 Marriage Act, R.S.M. 1970, Chap. M-50 amended by Chap. 71 of 1971.

65 Marriage Act, R.S.N.B. 1952, Chap. 139, Sec. 14 and 17.

66 The Solemnization of Marriage Act, R.S.N.S. 1967 Chap. 87 Sec. 14 & 17.

18 years, consent of certain persons is required before a licence can be issued. In Newfoundland, over the age of 21 years parties have full capacity to marry.

Thus there is a great divergence in the age requirements between the provinces. The age for marriage with consent varies from 12 to 21 years. The age of absolute capacity ranges from 18 to 21 years.

The tendency throughout the world is toward raising the age of marriage. The Australian Commonwealth Marriage Act, 1961 puts the minimum age of marriage in Australia at 18 years for males and 16 years for females. In order to evaluate the proposal whether the marriage age in Canada should be increased or decreased, the following statistics of Ontario should be considered.[67]

Year	Number of bridegrooms under the age of 21 years	Number of bridegrooms under the age of 18 years	Number of brides under the age of 21 years	Number of brides under the age of 18 years	Number of brides under the age of 16 years
1963	7,277	351	20,218	4,265	340
1964	7,763	411	21,890	4,890	332
1965	8,484	383	23,081	4,669	305
1966	9,829	453	25,336	4,555	320
1967	10,961	434	27,007	4,692	327

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67 Ontario Family Research Project

There are indications that marriages of people under 21 are less likely to be enduring unions than marriages of people over that age. According to Mr. Reed:[68]

> "It has been estimated that 70% of Canadian desertions occur in the first five to ten years of marriage and most often among spouses in their mid-twenties."

This would suggest that a minimum age for solemnization of marriage under 21 years is ill advised. However, there are factors which point that despite the seeming necessity for a high minimum age for solemnization of marriage, perhaps at 21 years a lower level is ultimately more desirable. The answer to a high rate of marriage breakdown for people who marry too young is more likely to be found in better training and education for marriage and married life and a greater effort to encourage young people to exercise wisdom and discrimination in interpersonal relations, than in a radical upward revision of the minimum age for solemnization of marriage.

Considering all the aspects, it is submitted that the fixation of minimum age for the solemnization of marriage in India and Canada is satisfactory and require no immediate change. The difference between the age of the females and males is also significant because of the earlier attainment of physical and social maturity in women than in men, because males, statistically, tend to marry persons younger than themselves; because it is essential that a young man shall have achieved

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68 Family Law Project, "Working Paper on Marriage and Marriage Breakdown", FL - IV, at p. 23.

a degree of emotional and financial independence and self-sufficiency.

[E] MENTAL AND PHYSICAL CAPACITY

(i) Hindu Law

Marriage under the Hindu Marriage Act 1955 is a Sacrament for the man as well as the woman. Since it was in the ancient times also not a contract, it was generally presumed that the consenting mind was not required and from this assumption the validity of the marriage of persons of unsound mind and non-age was presumed. But gradually it became necessary to examine whether an idiot or a lunatic, (where the loss of reason is complete), who is incompetent to accept the gift of the bride, which is a necessary part of the ceremony of marriage, can constitute a valid marriage or not.

The texts of Manu,[69] Yajnavalkya,[70] and Narada[71] do not lay down explicitly that a person of unsound mind can contract a valid marriage; but the validity of such a marriage has been inferred from these texts.[72] Since leading commentators have concluded that a person of unsound mind cannot marry, these texts cannot be pressed in support of the validity of such marriages.

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69 Manu IX, 201 - 203.

70 Yajnavalkya II, 140.

71 Narada XIII, 21-22.

72 The texts while laying down that certain persons such as impotent, outcasts, idiot, lunatics, etc., are excluded from inheritance, merely say that the offspring of such persons are entitled to take their share. From this the inference is drawn that disqualified persons, including a person who is unsound in mind, are competent to enter into a valid marriage.

Another incongruity that may be pointed out is that even if it is presumed that soundness of mind is essential in the case of a bridegroom, the requirement of soundness of mind in the case of a bride is nowhere thought of in the shastras. A bride in the Hindu marriage is a passive participant in the whole transaction and it can be categorically stated that the marriage of a girl of unsound mind is valid under the Hindu law. It is indeed an anomalous situation that if the bride is unsound in mind, the marriage is valid, but when the bridegroom is unsound in mind, the marriage is void.[73]

Under the Hindu Marriage Act, 1955,[74] neither party to a marriage should be an idiot or a lunatic at the time of marriage. The act does not define the words idiot or lunatic. An idiot is one who is so deficient in mind as to be permanently incapable of rational conduct.[75] Idiocy is the most extreme form of mental unsoundness.[76] An idiot is a term applied to a person whose mind has been defective from birth, whereas unsoundess of mind usually has some later and traumatic origin.[77] Idiocy is a form of congenital insanity, that is, a form of insanity due to the absence of development of the mental faculties and

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73 B.N. Sampath, "Marriageable Age, Consent and Soundness of Mind in Indian Matrimonial Law: A Plea for Rationalization," (1969) 5 Benaras J.L.J. at 45.

74 Section 5 (ii).

75 Concise Oxford Dictionary.

76 Kanhaiyalal v. Harsing, A.I.R. [1944] Nag. 232.

77 Sonabati Devi v. Narayan Chandra, A.I.R. [1936], Pat. 423.

intelligence from the very childhood. In order to hold a person to be an idiot it is not sufficient to find that he is a mere imbecile.[78] In the Mental Deficiency Act 1913 (Scotland), 'idiots' are defined as "persons so defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers." A man of feeble mind and with the mental capacity of a child is not, however, an idiot; in law an idiot means something more. An ordinary child of 8 or 9 years cannot be termed as idiot, nor can a man of 54 years with the mentality of a child be termed an idiot.[79]

Whether a party is an idiot or lunatic is a question of fact to be determined on evidence. The burden of proving either allegation lies heavily on him who asserts it.[80]

(ii) Canadian Law

As regards mental capacity, the law of England[81] forbids the marriage of lunatics. Since the Dominion Parliament has not legislated on this point, and the provincial legislature cannot legislate on matters affecting capacity, the law of England remains the applicable law in the provinces. In most provinces like Manitoba,[82] Prince Edward Island,[83]

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78 Mt. Titli v. Alfred Robert Jones, A.I.R. [1933] All - 122.

79 Ibid.

80 J.D.M. Derrett, "Introduction to Modern Hindu Law," (Oxford) (1963), at 154.

81 5 Com. IV Ch. 10.

82 Marriage Act R.S.M. 1970 Chap. M-50 as amended by Chap. 11, Sec. 23.

83 Marriage Act R.S.P.E.I. 1969 Chap. 22.

Saskatchewan,[84] etc., there is a statutory reference to this incapacity.

A person must have the mental capacity to understand the nature and responsibility of marriage in order to give a voluntary consent to the marriage at the time of the marriage ceremony.

As regards physical health, there is no statutory requirement provided by the law of England on health matters. At common law[85] it is a requirement that a person should not be suffering from a serious infectious disease such as tuberculosis at the time of the marriage. The provincial legislatures have attempted to provide some kind of health requirement before a marriage may be entered into, but since such legislation is beyond the scope of their authority its validity is questionable. The provinces cannot stipulate that a marriage would be invalid because one or both parties do not comply with the health requirements. Thus, for example, the Marriage Act of Alberta requires a medical test for syphilis to be taken before marriage license may be issued. This Act attempts to make it a requirement of physical capacity that neither party should be suffering from syphilis at the date when the marriage licence is issued.[86]

It is submitted that such legislation is beyond the scope of the authority of the provincial legislature and its validity is questionable.

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84 Marriage Act R.S.S. 1965 Chap. 338.

85 See Chartkow v. Feinstein [1929] 2 W.W.R. 257.

86 Section 21 (1).

The provinces cannot stipulate that a marriage would be invalid because both the parties do not comply with the health requirements.

[F] CONSENT OF THE THIRD PARTIES

(i) Hindu Law

Express or implied agreements of the parties to enter into the state of marriage appears, in modern times, to be an indispensible requirement for a valid marriage. However, a marriage solemnized without such consent under certain circumstances is not invalid in Indian Matrimonial law. Absence of consent contemplated in the present context does not include the presence of dissent which undoubtedly affects the validity of a marriage.[87] It connotes inaction on the part of the actual parties which may be due to their incapacity to give such consent or due to social norm of ingorning such consensus.[88] It may be stated in general that where the formalities of marriage are contractual in character the consent of the parties is indispensible; but where the formalities are sacramental in nature, consent may not be essential. Indian matrimonial law admits, as noticed above, the validity of the marriage of minors, though the persons responsible for such marriage are liable to penalties.[89] The parties to such marriages are incapable

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87 See Section 12(c) of the Hindu Marriage Act, 1955 and Section 25 (iii) of the Special Marriage Act.

88 B.N. Sampath, "Marriageable age, Consent and Soundness of Mind in Indian Matrimonial Law: a Plea for Rationalization," supra note 73 at p. 34.

89 The Hindu Marriage Act 1955, Section 8.

of giving consent due to their minority and therefore the requisite consent is supplied by their parents or guardians.

The usual marriage contemplated under the traditional Hindu Law was one between a bride who had not attained puberty,[90] consequently a minor, and an adult bridegroom.[91] The consent of the parent or guardian of the minor bride, and the bridegroom was required and sufficient and such a marriage created an irrevocable tie between the parties. Traditional Hindu Law also enumerated the guardians who were enjoined to give away the girl in marriage.

This provision of the law which empowered the parents or guardians to constitute a valid marriage on behalf of their wards had two inherent disadvantages. First, in spite of the bona fides of the parents or guardians to safeguard the welfare of their wards, in most of the Indian marriages considerations that are extraneous to the interests of the actual parties to the marriage are bound to play a prominent role in influencing the consent of the guardians.[92] Secondly, since such a marriage under some of the personal laws created an irrevocable tie

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90 Kane, "History of Dharamsastra", Vol. 2 (Bombay) (1941) at 440.

91 It is ordained in the Sastras that a boy of 8 - 12 years should undertake the Vedic studies the duration of which would extend to a minimum period of 8 years. Therefore, the boy will be completing the age of 16 years even if he takes the minimum period of studies. Under ancient Hindu law a person attained majority by the completion of the 16th year.

92 The emphasis on "good family background" which may not have any relevance to the actual accomplishments of the parties or their likes and dislikes is well known.

tie between the parties, it gave rise to several other problems. Further, not all the personal laws enumerated specifically the marriage guardians and this posed some difficulty in ascertaining the validity of marriage brought about by persons having no locus standi.

The Hindu Marriage Act 1955 has removed some of the above defects and has stated the guardians empowered to supply consent to such which are valid and irrevocable as follows:[93]

> (1) Where the consent of a guardian in marriage is necessary for a bride (under the age of 18 years) the persons entitled to give such consent shall be the following in the order specified hereunder, namely:
>
> (a) the father
>
> (b) the mother
>
> (c) the paternal grandfather
>
> (d) the paternal grandmother
>
> (e) the brother by full blood; as between brothers the elder being preferred
>
> (f) the brother by half blood; as between brothers by half blood, the elder being preferred; provided that the bride is living with him and is being brought up by him
>
> (g) the paternal uncle by full blood; as

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93 The Hindu Marriage Act 1955, Section 6.

between paternal uncles, the elder being preferred

(h) the paternal uncle by half blood; as between paternal uncles by half blood the elder being preferred; provided that the bride is living with him and is being brought up by him.

(2) No person shall be entitled to act as a guardian in marriage under these provisions unless such person has himself completed his or her 21st year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses or is for any cause unable or unfit to act as such, the person next in order shall be entitled to be the guardian.

(4) In the absence of any such person, the consent of a guardian shall not be necessary for a marriage under this Act.

(5) Nothing in the Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interest of the bride for whose marriage consent is required, the court thinks it necessary to do so.

Where the parties have attained majority, their consent is essential for the validity of their marriage. Here again, the

requirement of express consent has not been laid down by all the personal laws, the reason being that under certain systems such as that of the Hindus, the social norm prevents the eliciting of express consent at the time of marriage. Absence of express consent is not fatal to the validity of the marriage for law presumes implied consent except where there is the element of force or fraud.

It is significant that neither the traditional Hindu Law nor the Hindu Marriage Act has taken notice of the marriages wherein both the parties are minors. It is for this reason that the enumeration of guardians has been confined only with respect to the bride. In spite of the absence of provisions in this regard such marriages have taken place in large numbers and the community has presumed the validity of such marriages. The omission of the list of guardians in the case of a bridegroom under the Hindu Marriage Act has given rise to certain anomalies. If, for instance, the marriage of a minor boy is caused to be solemnized by a de facto guardian, say, for instance, a distant kinsman having the custody of the boy, who is desirous of making a bargain of the transaction, can the boy on attaining the age of majority plead that his marriage is invalid since neither had he the capacity to enter into marriage nor his guardian the authority to supply the requisite consent? It is submitted that such marriages are of doubtful validity even though they have been presumed to be valid.[94] in the past.

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94 Sivanandy v. Bhagavathya A.I.R. [1962] Mad. 400, 402.

Regarding the priority of the guardians whose consent is required for the marriage of a minor girl, it is well settled that a mere suppression of a prior guardian by a subsequent guardian would not affect the validity of a marriage unless it is grossly prejudicial to the interests of the girl. The courts have considered guardianship in marriage more as a duty than a right[95] and declared the marriages valid.

(ii) Canadian Law

There are many differences between the exact provisions of the various provincial statutes. Generally, statutory provisions require that over a certain age (21 years or 18 years) consent of a third person is not necessary for a marriage to be solemnized because parties have full capacity to be married. The consent of certain persons such as parents or guardians is required for certain ages (these vary from 12 years to 21 years) before the marriage may be solemnized. This is because of the fact that an infant in law lacks capacity to enter into a binding contract enforceable against him which may turn out to be not for his benefit. The laws of some provinces prescribe the effect of noncompliance with the requirement of consent. Generally speaking, where licence has been issued or a marriage solemnized in violation of such a prohibition, the marriage will not be invalid unless there is an express statutory provision to that effect or the statute demonstrates

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95 Kasturi v. Chiranjilal [1963] I.L.R. 35 All. 265.

a clear intent to that end.[96]

The provisions of the Alberta statute are as follows:[97]

The marriage Act provides that a person under 16 years of age may not have a marriage licence issued to him or a marriage solemnized (except in the case of a pregnant woman and mothers of illegitimate children). Persons over the age of 18 years may have a licence issued and a marriage solemnized without requiring the consent of the third parties.

Persons between 16 and 18 require the consent of third parties to their marriage.

Persons between 16 and 18 years need the consent of both father and mother. If one parent is dead or mentally incompetent, the sole consent of the other parent is sufficient.

Where the parents are divorced or separated the consent of the parent who has judicial custody of the child is required.

Where both parents are dead or mentally incompetent, the consent of the person's 'legal' or 'de facto' guardian, or (where the person is a ward of the government) the consent of the Superintendent of Child Welfare is required.

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96 Hobson v. Grey [1958], 25 W.W.R. 82.
See also: Julien Payne, "Power on Divorce", (Butterworth) (2nd ed. 1964) at 347.

97 Marriage Act R.S.A. 1971, Chap. 226, Sec. 16, 17, 18, 19.

Consent of third parties is not required where

(1) the person is between 16 years and 18 years of age and both parents are dead or mentally incompetent and there is no guardian.

(2) the person is between 16 and 18 years and is a divorcee, widow or widower.

Persons between 16 and 18 years who require the consent of their parents or guardians and are not able to get the requisite consent can apply to the supreme court or district court judge for an order dispensing with consent.

The Marriage Act also attempts to provide for the effects of lack of consent on a marriage. The marriage of persons between 16 and 18 years who are married without the requisite consent is void (subject to three exceptions). The exceptions are:

(a) Carnal intercourse has taken place between the parties prior to the ceremony, or;

(b) The marriage has been consummated; or

(c) The parties have after the ceremony cohabited and lived together as man and wife.

The Marriage Act of British Columbia is more elaborate than the statute of Alberta as to the consent of the third parties which is required for the marriage. The provisions are as follows:

The Marriage Act provides that a person under 16 years of age may not have a marriage licence issued or a marriage solemnized (except when a supreme court or county court judge considers it expedient to allow the marriage of a person under 16 years). Persons over the age

of 19 years may have a licence issued and a marriage solemnized without requiring the consent of third parties.

Persons between the age of 16 and 19 years require the consent of the following third parties to their marriage:

(1) Both parents (where both parents are joint guardians of the persons under 19 years);

(2) Sole parent (i.e., parent who is sole guardian of the person in cases where both parents are not joint guardians);

(3) Sole surviving parent (where the other parent is dead);

(4) Legal guardian (where both parents are dead);

(5) Official guardian, supreme court judge or county court judge (where both parents are dead and there is no legal guardian).

Consent of the third parties is not required where

(1) the third party is "non compos mentis" (i.e. suffers from a mental disorder);

(2) the third party is out of the province;

(3) the third party refuses or withholds consent unreasonably or from undue motives;

(4) the third party's whereabouts are unknown and cannot be discovered after a diligent search.

In such stituations the person who is being married and who cannot get the requisite third party consent must obtain a declaratory order from a supreme court or county court judge in lieu of the necessary consent.

The Marriage Act also attempts to provide for the effects of the lack of consent on a marriage. The marriage of any person between 16 and 19 years who marry without the requisite consent is not invalid.

The marriage of any person under 16 years of age who marries without the requisite judicial court order is not invalid.

The provincial statutes of Manitoba, Newfoundland, Ontario and Prince Edward Island do not provide for the effect of lack of consent.

[G] CEREMONIES AND MODES OF MARRIAGE

(i) Hindu Law

While the formalities of marriage under other systems are simple and contractual in character, the Hindu Sastras have laid down numerous, elaborate and complex ceremonies. Whenever the validity of a Hindu marriage is in issue, the court generally take into account three important ceremonies, namely, the Kanyadan or gifting away of the girl, the Panigrahana or dextarum junctio, and the Saptapadi or the taking of the seven steps around the sacred fire installed for the occasion.

The ancient Hindu law recognized eight forms of marriages. They are:

(1) Brahma

The gift of a daughter, after decking her with costly garments and honouring her by presents of jewels, to a man learned in the Veda and

of good conduct, whom the father himself invites is called the Brahma rite.

(2) Daiva

The gift of a daughter who has been decked with ornaments, to a priest who duly officiates at a sacrifice during the course of its performance, they call it Daiva rite.

(3) Arsha

When the father gives away his daughter according to the rule, after receiving from the bridegroom, for the fulfilment of the sacred law, a cow and a bull or two pairs, that is named the Arsha rite.

(4) Prajapatya

The gift of a daughter by her father and after he has addressed the couple with the text 'May both of you perform together your duties', and has shown honour to the bridegroom is called Prajapatya rite.

(5) Asura

When the bridegroom receives a maiden, after having given as much wealth as he can afford, to the kinsmen and to the bride herself, according to his own will, that is called Asura rites.

(6) Gandharva

The voluntary union of a maiden and her

lover, one must know to be Gandharva rite, which springs from the desire and has sexual intercourse for its purpose.

(7) Rakshasa

The forcible abduction of a maiden from her house, while she cries out and weeps, after her kinsmen have been slain or wounded or their house broken open, is called the Rakshasa rite.

(8) Paisacha

When a man by stealth seduces a girl who is sleeping, intoxicated, or unconscious, that is the eighth, the most base and sinful Paisacha rite.

Out of these eight forms, four were considered as approved forms which were Brahma, Daiva, Arsha, and Prajapatya and four were unapproved forms which were Asura, Gandharva, Rakshasa and Paisacha.

Formerly it was of importance to know in what 'form' a woman was married, since upon that question turned the claim to succeed to her estate on her death intestate. Of the original eight forms of conjugal union recognized by the Sastras (conferring legitimacy on the issues) only two survived in 1955,[98] Brahma and Asura. By far the most common was the Brahma form in which the girl was given to her bridegroom. All

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98 Derrett, "Introduction to Modern Hindu Law", (Oxford) (1963) at 147.

marriages were presumed to be in an 'approved form', such as Brahma was, and therefore even the remarriage of a widow was presumed to be Brahma in form.[99] Thus it is to be noted that where the father or the guardian of the bride gives the bride in marriage without receiving any consideration from the bridegroom for giving the girl in marriage, it is called Brahma. But where he receives such considerations, the marriage is called Asura, even though it may have been performed according to the rites prescribed in Brahma.

The test is two-fold and was laid down by the Supreme Court in Veerappa v. Michael.[100]

(a) There shall not only be benefit to the father, but the benefit shall form a consideration for the sale of the bride.

(b) Bearing of the expenditure of the marriage wholly or partly by the bridegroom of the parent is no criterion of the matter such as indirect gain by the bride's father cannot be regarded as consideration for giving the bride in marriage.

The mere giving of a present to the bride or to her mother as a token of compliment to her does not render it an Asura marriage.[101]

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99 Velayutha v. Suryamurthi, A.I.R. [1941] Mad. 219.

100 A.I.R. [1963] Mad. 286.

101 Hira v. Hausji, [1913] 37 Bom. L. J. 295.

Thus what distinguishes the one form from the other is that in Brahma form it is a gift of the girl pure and simple, and in the Asura form it is the sale of the bride for pecuniary considerations. That consideration is called Shulka or price.

Where there is a question as to whether a marriage was in the Brahma form or the Asura form, the court will presume that it was in the Brahma form; in other words, that no consideration for the marriage passed from the bridegroom to the father or other guardian of the bride. But this presumption may be rebutted by showing that the marriage was in Asura form.[102]

Thus the status of husband and wife is constituted by the performance of the marriage rites, whether prescribed by the Sastras or by custom. The common forms of marriage rites were:

(a) The performance of the Homan.

(b) The Panigrahana or taking hold of the bride's hand and going round the fire with vedic mantras.

(c) The treading on the stone.

(d) Saptapadi or taking of seven steps around the burned fire.

The marriage becomes complete and irrevocable on the completion of the Saptapadi or ceremony of seven steps and from that moment the wife

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102 Gopi v. Gokhai, A.I.R. [1954] Orissa 17.

passes into her husband's gotra.[105] Till then marriage is imperfect and revocable.[103] Where the Hindu community does not recognize the Homan of Saptapadi as essential, their omission will not render the marriage invalid.[106]

The Hindu Marriage Act 1955 for ceremonies provide:[104]

> (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.
>
> (2) Where such rites and ceremonies include the Saptapadi (that is the taking of seven steps by the bridegroom and bride jointly before the sacred fire) the marriage becomes complete and binding when the seventh step is taken.

The Act does not, however, prescribe the ceremonies requisite for solemnization of the marriage but leaves it to the parties to choose a form of ceremonial marriage which is in accordance with any custom and usage applicable to either party.

Though the Act emphasizes the importance of the Saptapadi it does

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103 Mayne, "Hindu Law and Usage" [1953] (Madras) 11th ed.) at 161.

104 Section 7.

105 Bulli Appanna v. Subamal, A.I.R. [1938] Rang. 111.

106 Rampiyar v. Deva Ram, A.I.R. [1923] Rang. 129.

not insist upon the same. All that the Act insists is that it must be in accordance with the customary rites and ceremonies of either party to the marriage. The custom, of course, must be a valid custom. Whether it is a caste custom or a custom by any sub-caste or a custom of a particular locality or of a family, it must be ancient, certain and reasonable and not opposed to public policy. It cannot be enlarged beyond the usage by parity of reasoning since it is the usage that makes the law and not the reason of the things.[107].

Under the Indian law, it is open to two Hindus if they so desire it to contract civil marriage and have it solemnized under the Special Marriage Act, 1954. The modes of marriages prescribed by this Act are as follows:[108]

When a marriage is intended to be solemnized under the Special Marriage Act, the parties to the marriage shall give notice thereof in writing to the marriage officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given. The marriage officer shall cause every such notice to be published by affixing a copy in some conspicuous place in his office. Any person may before the expiration of thirty days object to the marriage.

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107 Mulla, "Hindu Law", (Bombay) (1966 - 13th ed.), at 691

108 Chapter II and III of the Act

Before the marriage is solemnized the parties and three witnesses shall, in the presence of the marriage officer, sign a declaration and the declaration shall be countersigned by the marriage officer.

The marriage may be solemnized at the office of the marriage officer, or at such other place within reasonable distance therefrom as the parties may desire, and upon such additional fee as may be prescribed.

When the marriage has been solemnized, the marriage officer shall enter a certificate in a book and such certificate shall be signed by the parties to the marriage and the three witnesses.

The consequence of such a marriage is that when a member of a joint Hindu family marries under the Act, he ceases to be an undivided member of that family and his share in the coparcenary property as of that date becomes separated and vests in him absolutely, and is governed no longer by the rule of survivorship.[109]

(ii) Canadian Law

In the various Canadian provinces there are generally speaking three modes or procedural routes to a marriage ceremony. The first mode is by issue of a marriage licence; this is perhaps a purely civil or legal mode. The second is by publication of banns; this

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109 S. N. Bagga, "Statutory Changes in Hindu Law", (Allahabad) (1969) at 5 (8)

is a religious mode permitted by civil law.[110] The third is a general assortment including dispensation from banns; a special certificate, a civil requirement followed by a religious ceremony; ethnic or religious customs recognized and permitted by civil law, etc. The purpose of all these modes is two-fold. The first is to keep the marriage public and open to general knowledge. The second is to maintain some kind of state control over the formation of the contract of marriage.

(a) Marriage by Licence

In almost all the provinces this is a mode of marriage which is either the sole mode or the principal mode together with one or more other alternatives. Where a marriage is to be solemnized and the mode chosen by or required of the parties is the marriage licence, the provincial statutes state in detail the steps which the parties must take and the requirements which must be fulfilled before a marriage licence is issued.

Generally these steps and requirements are:

(1) The parties should have capacity to marry;

(2) Should fill in the forms and sign affidavits regarding capacity;

(3) Should satisfy medical requirements (against V.D.);

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110 Viz., non-criminal common law including provincial statute.

(4) Should have the requisite third party consent;

(5) Pay any fees or charges for the licence.

In some provinces there is a resident requirement and the onus of obtaining accurate information, consent, etc., is on the issuer of the marriage licence. In other provinces, requirements differ in detail. As a general rule, the issuer of a marriage licence may not also celebrate the marriage, but there are exceptions to this rule in several provinces.

Since the exact procedural requirements[111] do not differ much

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111
(Alberta) The Marriage Act R.S.A. 1970 Chap. 226 Sec. 8, 9, 10, 11

(British Columbia) The Marriage Act R.S.B.C. 1960 Chap. 232 Sec. 9, 14, 15, 16, 17, 18

(Manitoba) The Marriage Act R.S.M. 1970 Chap. 50 (as amended by Chap. 11 of 1970, Sec. 8, 9, 12 - 24.

(New Brunswick) The Marriage Act R.S.N.B. 1952, Chap. 139, Sec. 9, 12 - 18, 26

(Ontario) The Marriage Act R.S.O. 1960 Chap. 228 Sec. 5 to 11, 13, 14

(Prince Edward Island) The Marriage Act P.E.I. 1969 Chap. 27, Sec. 9, 13 - 21

(Saskatchewan) The Marriage Act R.S.S. 1965 Chap. 338, Sec. 19 - 30

(Newfoundland) The Solemnization of Marriage Act R.S.N. 1952 Chap. 160 Sec. 12 - 19

(Nova Scotia) The Solemnization of Marriage Act R.S.N.S. 1967 Chap. 287, Sec. 11 - 18

from province to province, a summary of the requirements of the province of Alberta are described below.

The Marriage Act of Alberta provides:

Every person must be married within three months of the date of issue of the marriage licence and a marriage ceremony may be performed only under the authority of the marriage officer. The person who is to be married must take the following steps:

(1) Pay the licence fee[112]

(2) Produce a medical certificate of a blood test to prove absence of syphilis[113]

(3) Produce a completed form of particulars regarding capacity, consent, etc., and in the form of an affidavit sworn to before the issuer of marriage licenses.[114]

(4) Produce proof, witnesses, etc., to establish the accuracy of all the statements made by the applicant

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112 The Marriage Act, R.S.A. 1970 Chap. 226 Section 13.

113 The Marriage Act, R.S.A. 1970 Chap. 226 Section 22.

114 The Marriage Act, R.S.A. 1970 Chap. 226 Section 13.

if any statement is doubted by the issuer of licences.[115]

(5) Produce a court certificate or other proof of a divorce or nullity decree and no appeal is pending.[116]

(6) Produce proof of age, consent and medical certificates in the case of a pregnant girl under 16 years.[117]

(7) Produce written consent of third parties. The issuer of the licence has the duty to inform a third party whose consent is required of the statutory provisions.[118]

The applicant is punishable by a fine or imprisonment for making a false statement.[119] The issuer of licences is punishable by fine or imprisonment for failure to observe all the requirements of the Act regarding issue of a marriage licence.

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115 The Marriage Act, R.S.A. 1970 Chap. 226 Section 14

116 The Marriage Act, R.S.A. 1970 Chap. 226 Section 15

117 The Marriage Act, R.S.A. 1970 Chap. 226 Section 16

118 The Marriage Act, R.S.A. 1970 Chap. 226 Section 17

119 The Marriage Act, R.S.A. 1970 Chap. 226 Section 28

Once the marriage licence has been issued to the applicant, he is free to have the marriage ceremony performed any time within three months.

It may be pointed out that the marriage licence is the sole mode for marriage in the provinces of Alberta, Prince Edward Island, and Nova Scotia. Religious modes such as publication of banns are not recognized in these provinces. The Marriage Act provides for a marriage licence and a ceremony performed by a registered clergyman or a counsellor.

The mode of marriage by licence derives its origin in the practices of the Church of England. By the Tudor Act concerning Peter Pence and Dispensations of the time of Henry VII[120] the Archbishop of Canterbury or any person authorized by the Act had power to issue a marriage licence. Through the influence of the Church of England in colonial times this mode came to be generally prevalent throughout Canada; and eventually came to be accepted as a civil mode in the provincial marriage acts. It lost its church-affiliated character and became a civil mode in view of the administrative changes made by the provincial governments regarding the issuers of licences and other procedural matters. This may be contrasted with the mode of publication of banns which continues to have a religious flavour and is a religious mode recognized by provincial civil law.

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120 25 Hen. 8 Ch. 21 Section 3. Repealed 102 Ph. and M.C. 8 revived 1 Eliz. Ch. 1.

(b) Marriage by Publication of Banns

The origin of this mode of marriage may be traced to the early ecclesiastical influences in England. The word "bann" is an Anglo-Saxon term meaning announcement or a statement made public to a number of persons. The original reason for the institution of this mode was to prevent clandestine or foolish marriages by children or minors. In medeival and Tudor England, marriages were wholly a matter in the hands of the priesthood, and were governed by ecclesiastical law and practice. A general practice was the solemnization of the marriage ceremony of two persons by the local parish priest of the place in which the parties resided.

Publication of banns serve a practical purpose for ecclesiastical law and practice. Inhabitants of the parish would have knowledge of facts such as age of parties, lack of capacity due to relationship within the prohibited degrees, etc., and would be able to inform the parish priest of any fact which would render the marriage void or voidable. This was a safeguard for the priest in that it could save him from solemnizing a marriage which was a nullity. It also had another practical purpose in that it gave notice or warning to parents or guardians of the parties to the marriage of the fact that their children were about to enter into matrimony: and thus gave parents an opportunity to intervene and prevent the marriage or take other suitable action. Basically, publication of banns was an attempt at a means to prevent secret or clandestine marriages in a parochial society, where people did not normally travel or move far from their parish.

Some of the old provincial marriage acts (e.g. British Columbia, Manitoba, New Brunswick, Ontario) provide for the publication of banns

as an alternative to the marriage licences. The Solemnization of Marriage Act of Newfoundland is silent on the point of publication of banns. By custom, this mode is in practice. The Act is concerned with registration of marriages and persons authorized to perform marriages. The following is a summary of the British Columbia provincial enactments on this mode.[121]

The Marriage Act (British Columbia) provides for the publication of banns as an alternative to the marriage licence. The Act provides that a minister or clergyman who is to solemnize the marriage must proclaim the banns in a loud voice during divine service in the place of worship of the religious group to which the clergyman belongs and in the area in which at least one of the parties has resided for a minimum period of 8 days. Banns must be announced clearly in an audible voice so that notice of the intended marriage of the parties is given to the congregation present in the place of worship. Banns must be proclaimed on two consecutive Sundays or other regular holidays or worship of the religious groups during the religious service. If the clergyman who publishes banns is not going to solemnize the marriage, then he must give a certificate to the parties that banns have been duly published, and the parties must give the certificate to the clergyman who solemnizes the marriage so that the latter has authority to perform the ceremony. The clergyman publishing the banns must file a certificate of publication with the Registrar of Births, Deaths and Marriages between the date of

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121 (British Columbia) The Marriage Act R.S.B.C. 1960 Chap. 232 Sec. 9.

first and second publication. This mode of marriage requires that at least one party to the marriage should reside for a minimum period of 14 days in the church district in which the banns are proclaimed.

(c) Other Modes of Marriages

The Provinces of British Columbia,[122] Manitoba,[123] and Ontario,[124] provide a third alternative to the two modes described above. This alternative may take the form of a dispensation from banns as in Manitoba or a civil certificate for marriage as in British Columbia or special permit as in Ontario. Other provinces do not provide such alternative modes of marriage. They are useful institutions where neither licence nor banns would be of value for the purpose of enabling a marriage ceremony to be performed.

The Marriage Act (British Columbia) provides that where the parties to the marriage desire a civil marriage before a marriage commissioner, a certificate must be obtained as follows:

(a) Parties must give notice in writing to the marriage commissioner of the district where the parties intend to be married at least three days before the date of the proposed marriage.

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122 (British Columbia) The Marriage Act R.S.B.C. 1960 Chap. 232 Sec. 9, 14, 20, 21.

123 (Manitoba) The Marriage Act R.S.M. 1970 Chap. M-50 as amended by 11 of 1970, Sec. 8.

124 (Ontario) The Marriage Act R.S.O. 1960 Chap. 228 Sec. 4 & 26.

(b) The notice must be accompanied by a statutory declaration regarding capacity, etc.

(c) At least one of the parties must attend in person before the marriage commissioner or other authorized person to give the statutory declaration.

(d) Three days after receipt of both documents and upon being satisfied of the accuracy of all statements, the commissioner may issue a marriage certificate.

(e) A civil marriage may thereafter be solemnized by a marriage commissioner any time between a minimum of three months after the issue of the marriage certificate.

The Marriage Act (Manitoba) provides dispensation from publication of banns. The Act provides that the head of a church or congregation to which one of the parties belongs may, according to the custom of that religious denomination, grant a dispensation of publication of banns. The certificate of dispensation is treated as though it was a marriage licence, the parties are under the same obligations to pay a licence fee to the provincial treasurer as they would be for a licence. It is not clear from the Act whether the certificate of dispensation is in lieu of a licence or in addition to a licence. The better view is that it is in lieu of a licence.

The Marriage Act (Ontario) provides that the provincial secretary

may authorize the solemnization of a marriage by a special permit in a prescribed form. A civil marriage may be solemnized by a judge or magistrate under the authority of a special permit.

(d) The Ceremony of Marriage

The precise form of the marriage ceremony is not prescribed in detail in any provincial statutes. Generally these statutes provide for two types of ceremonies, - one a civil marriage ceremony performed by a marriage commissioner, and secondly, a ceremony performed by a registered clergyman.

The statutes of British Columbia and Prince Edward Island in addition to the above two types provide the ceremony of marriage for certain ethnic or religious groups such as Doukhobors. As regards this third form the Act provides that at meetings of Doukhobor groups the parents of the persons to be married must proclaim the proposed marriage in an audible voice at least eight days before the ceremony and mail to the district registrar of marriages a declaration of the proclamation. The marriage ceremony may be performed according to the rites and customs of the religion practiced by the Doukhobors. Immediately after the ceremony the parties and two witnesses must sign a record stating that the marriage has taken place and one of the parties must register this with the district registrar of marriages.

It is submitted that the Hindu Law unlike the Canadian law does not have any provision as regards medical requirements of health prior to the marriage. The Canadian law requires a blood test for syphilis before the parties can get married. It is desirable to have such a provision in the Act for the benefit of the health of the offsprings and a happy marriage and for the society as a whole.

As already suggested, another measure namely, the registration of marriages provided under the Hindu Marriage Act, 1955 which would have discouraged the practice of child marriage, in an indirect way, has been ignored. Registration of marriage would obviously require the parties or their parents to furnish all the details, including the age of the parties to the concerned authorities. Indeed Obligatory Registration would ensure compliance with the provisions of the Child Marriage Restraint Act, for, the parents would think twice before arranging the marriage of their children if they knew that the data they are required to furnish for registration would enable the authorities to take action. Moreover the state will have an exact data of how many marriages take place per year. Thus it is submitted that instead of the Act giving a discretionary power to the state to make the registration compulsory or not, the central government should pass such a legislature making it compulsory.

CHAPTER IV

ANNULMENT OF MARRIAGE

[A] GENERAL

(i) In Hindu Law

The status of marriage is one in which the whole society has an interest. It is not because of religious and ethical considerations but because economic and social stability of the society depends much upon marriage. Hence the law takes note of weakening of the marriage tie. But law cannot regulate the form of agreement between spouses. Their promises are not sealed and the consideration that obtains for them is the natural love and affection which counts for so little in the cold course.[1] But it is seen that very often unavoidably marriage bond loses and the law intervenes to allow the marriage to be dissolved. Nullity is such a provision of law that has been incorporated in the Hindu Marriage Act 1955.[2]

While divorce presupposes the existence of a valid marriage, nullity proceedings presuppose a marriage which exists only in appearance. The basis of a decree of nullity is that, while the parties have gone through a ceremony of marriage, they have in fact never been married. This may be because the ceremony of marriage they went through was insufficient in form to create a married status between them.[3] It may be because the parties were legally incapable of marrying each other.[4] It might be that one of

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1 Balfour v. Balfour (1919) 2 K.B. 571.

2 The Hindu Marriage Act 1955, Sec. 11 and 12.

3 The Hindu Marriage Act 1955, Sec. 5(i).

4 The Hindu Marriage Act 1955, Sec. 12(1)(c).

the parties, through insanity, fraud, or mistake did not in fact consent to marriage. On the other hand, the marriage may never have been consummated because one of the parties has refused to consummate it, or one of the parties may be incapable of consummating it.[5] In short, there are two sets of circumstances in which a marriage may be annulled as distinguished from dissolved: first, where there has never been a valid marriage, in which case the marriage is said to be void; and secondly, where there has been a marriage which was at its inception in all appearances valid, but which has turned out to be so defective in its nature that it is considered to be in the public interest that the marriage ought never to have taken place: in this type of case the marriage is voidable and once annulled was at common law regarded as having been void from the beginning.[6]

(ii) In Canadian Law

Under the common law the beginning of distinction between void and voidable marriages goes back to 1085 when William I referred cases involving the guidance of souls to ecclesiastical courts. Before that time, the various cases had been treated indiscriminately, apparently by clergymen, in various courts.[7] There was no 'English Law of Marriage'[8] for the period up to the Reformation. The ecclesiastical courts had jurisdiction over all marriage causes. With the Reformation starts the

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5 The Hindu Marriage Act 1955, Sec. 12(i)(a).

6 Inglis: "Family Law" [N.Z. - 1960] at 85.

7 F. Makower, "The Constitutional History and Constitution of the Church of England", (1895) 417 and 465.

8 F. Maitland, "Roman Canon Law in the Church of England", (1898).

English law of marriage. Owing to the peculiar division of jurisdiction between the ecclesiastical and common law courts in England, it was held in early periods that no special matter avoiding a marriage, as bigamy, for example, could be specially pleaded in a real action, but that the plea must be in the general form of 'ne unaques accouple in legal matrimonie' and that, upon issue thereon, a writ was sent to the bishop of the diocese.....and his certificate in return was conclusive both of the facts and legality of the marriage.[9]

Thus the distinction between void and voidable unions was not recognized until after the Reformation.[10] Prior to this time marriage was regarded as a sacrament and was regulated by ecclesiastical courts.[11] These tribunals operated under the canon law which regarded a marriage as either valid or unimpeachable or absolutely void. With the advent of the Reformation, England ceased to view matrimony as a sacrament, and the common law courts began restraining the ecclesiastical courts from annulling certain kinds of unions after the husband or wife had died.[12] Thus the common law courts would prohibit the ecclesiastical tribunals from decreeing void the marriage of a deceased person whose alliance was improper under canon law by reason of precontract[13] (prior

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9 Gathing v. Williams, (1845) 27 N.C.Rep. 487.

10 Tolstoy, "Void and Voidable Marriages" [1964] 27 Mod. L.R. 385, 386.

11 See also, F. Pollock and F. Maitland "The History of English Law" [1899] 2nd ed. Oxford, 366, 367.

12 Tolstoy "Void and Voidable Marriages" supra note 10 at 387.

13 Hemming v. Price [1791] 12 Mod. 432.

espousal to another, consanguinity,[14] or impotence.[15]) Blackstone stated,[16]

> "Now these disabilities are of two sorts:
>
> first, such as are canonical, and.....
> sufficient by the ecclesiastical laws to avoid
> the marriage in the spiritual courts:.....
> of this nature are precontracts; consanguinity
> or relation by blood; affinity or relation
> by marriage; and some particular corporeal
> infirmities. After the death of either
> of them (the spouses), the courts of common
> law will not suffer the spiritual courts
> to declare such marriages to have been
> void; because such declaration cannot now
> tend to the reformation of the parties."

On the other hand, when the marital impediment impressed the common law courts as being of a more fundamental character, as in the case of prior existing marriage, insanity or non-age, they would not interfere with the actions of the ecclesiastical courts, even though a party to the objectionable marriage had died.[17] This phenomenon led to the development of a distinction between a civil disability (such as prior existing marriage) and a canonical disability (such as impotence). A union burdened with a civil disability could be declared void at any time at the suit of any interested party, but a marriage burdened merely with a canonical disability became safe from attack upon the death of either spouse. By an understandable extension of thinking, the latter type of

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14 Harris v. Hicks [1692] 91 All E.R. 91.

15 Hartham v. Hartham [1945] 2 All E.R. 639.

16 Blackstone "Commentaries on the Laws of England" [1857 - 21st ed.) (Oxford) at 434.

17 Supra note 10.

marriage came to be regarded as valid until annulled, and at this point the distinction between void and voidable marriage had become fully developed.[18] Once having matured, the distinction continued to obtain recognition even after the common law courts assumed virtually exclusive jurisdiction over annulment and divorce actions. The Matrimonial Causes Act[19] created the new civil court of divorce and matrimonial causes and transferred to it (from the ecclesiastical courts) jurisdiction in matrimonial causes.

[B] DIFFERENCES BETWEEN VOID AND VOIDABLE MARRIAGE

The artificial legal distinction produced between void and voidable marriage by the interference of the common law with the practices of the ecclesiastical courts has resulted in some important differences arising at common law concerning the relief of nullity. These differences are summarized below:

1. (a) A void marriage is one which is null and void ab initio. No legally recognized marriage ever came into existence, and the parties are in the position of persons who never went through the semblance of performance of marriage.

   (b) A voidable marriage is one which is treated as a valid marriage with certain defects. Because of these defects, the parties to the marriage have a right to seek a decree from the court to have

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18 Coke, "Coke upon Littleton", [1628] at 33 - indicated that the void-voidable distinction was well established.

19 [1857] 20 and 21 Vict. C85.

the marriage set aside as being invalid. The status of marriage exists unless it is declared non-existent by judicial degree.

2. (a) In a void marriage situation, anyone (spouse, third parties or children), may petition the court for a declaration stating that the marriage is null and void.

   (b) In a voidable marriage situation, only the spouses to the marriage, during their lifetime, have the right to seek to have the marriage set aside through a decree of nullity from a court.

3. (a) For a void marriage, the proper relief to be sought from the court is a declaration of nullity. However, since no legally recognized marriage exists, it is not at all necessary to obtain a declaration from the court. A declaration is available and is given only in order to affix legal imprimatur to the fact situation.

   (b) In a voidable marriage situation, a marriage is legally recognized as having come into existence. The proper relief from the court is thus a decree of nullity, i.e., a positive act by the court affecting the status, rights and obligations of the parties. A decree is necessary in order to grant legal effect to the wish of the spouses to have their marriage set aside because of the defect.

4. (a) The effect of a declaration on a void marriage is simply to state that the marriage is a nullity and void ab initio, i.e. that no status, rights or obligations flowing from a legally valid marriage were ever created between the parties to the void marriage.

   (b) The effect of a decree of nullity for a voidable marriage is to

change the status rights and obligations of the parties from those of spouses to those of unmarried persons as from the date of the so-called marriage (and not merely from the date of the decree).

5. (a) The difference in effect as regards legitimacy of children is no longer important because most provinces in Canada now have provincial statutes saving the legitimate status of children of void and voidable marriages.

6. (a) A declaration of nullity is a judgment in rem in the sense that it is purely a judicial act stating that certain fact exists according to the law governing that fact. It is recognized by those within the jurisdiction of the court and also internationally by others beyond the jurisdiction of the court.

   (b) A decree of nullity is both a judgment in rem and a judgment in personam. It is a judgment in personam in the sense that it is an administrative act exercised by the judiciary altering the legal status, rights and obligations between two persons. It is a judgment in rem in that it is recognized by those within the jurisdiction of the court, i.e., it is binding not only between the parties inter se before the court but also upon all other persons within the jurisdiction of the court. It is not necessarily recognized internationally by other persons beyond the jurisdiction of the court.

7. (a) In a void marriage the woman never acquires the status of a wife. She retains the domicile which she had prior to the sham form of marriage and she is capable of changing her domicile throughout the period when she lives with the man under a false notion that

she is married to him.

(b) In a voidable marriage the woman acquires the status of a wife. Her domicile on marriage changes to that of the husband. She loses the right to effect a change of domicile independently from her husband as long as the marriage is not decreed a nullity by a proper court. This difference is important as regards the issue of jurisdiction of the court over the parties when a decree of nullity is sought.

8. (a) In a void marriage certain defences are not available to a petition for declaration of nullity, such as knowledge and acquiescence, or insincerity. The fact that one spouse knew of the other spouse's relationship within the prohibited degrees is not a defence to such a petition.

(b) In a voidable marriage defences such as insincerity and acquiescence, delay or laches are available. It should be noted that the defence of acquiescence is available also in the case of a marriage void for impotence in those provinces where there is a ground for declaring a marriage void ab initio. This distinction between void and voidable marriage has been thus judicially explained by Lord Green, in De Reneville v. De Reneville:[20]

> "A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as

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20 [1948] 1 All E.R. 56.

> never having taken place and can be so treated by both parties to it without the necessity of any decree annuling it; a voidable marriage is one that will be regarded as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction..... The fact that in both cases the form of the decree is the same cannot alter the fact that the two cases are in this respect quite different."

[C] GROUNDS ON WHICH MARRIAGE IS VOID

(i) Invalid Ceremony of Marriage

(a) Hindu Law

In India, the Hindu Marriage contemplated by the Act is a ceremonial marriage and it must be solemnized in accordance with the customary rites and ceremonies of one of the two parties. Non-observance of the essential customary rites and ceremonies of at least one of the parties would amount to failure to solemnize the marriage. A marriage not duly solemnized by performance of the essential ceremonies is, under the Act, no marriage at all.

The Act[21] does not refer to any form of marriage but only to the customary rites and ceremonies of marriage and therefore under this Act, as under the old law, for the validity of a marriage it is immaterial in what particular form the marriage has taken place. The marriage may be in any form recognized by Hindu law or by custom (whatever the caste to which the parties belong) except a form which has become obsolete or is

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21 The Hindu Marriage Act 1955, Section 7.

not recognized on grounds of public policy or is against any law.[22] As custom is "transcendent law" and expressly recognized by the Hindu law in the matter of performance of the marriage ceremonies, it is open to any party called upon the establish validity of a Hindu marriage to show that the customary rites and ceremonies of one of the spouses had been performed. The custom must, of course, be a valid custom. Whether it is a caste custom or a custom of any sub-caste or a custom of a particular locality or of a family it must be ancient, certain and reasonable and not opposed to public policy. It cannot be enlarged beyond the usage by parity of reasoning since it is the usage that makes the law and not the reason of the thing.[23]

(b) Canadian Law

In Canada whether failure to comply with the formal requirements relating to the marriage ceremony will make the marriage void must be determined by reference to the lex loci celebrationis. If the marriage is solemnized in England, it is not every defect in the formalities laid down in the marriage act that will render the ceremony a nullity. Whilst public policy requires that these formalities should be strictly observed, the consequences of avoiding any marriage where there was some technical defect, however slight, would be socially even more undesirable. English law has effected a compromise between these conflicting demands of public policy with the result that some formal defects will not

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22 S.V. Gupte, "Hindu Law of Marriage", (Bombay) (1961) at 124.

23 Mulla, "Hindu Law" (Bombay) (13 ed. 1966) at 639.

render the marriage void at all, whilst in the case of the rest, marriage will be void only if both parties contracted it with the knowledge of the defect. In other words, it is impossible for a person in England innocently to contract a marriage which is void because of the formal defect.[24]

The law is the same in Canada. The Marriage Act[25] specifically mentions that a marriage is not invalidated by reason only of a contravention or non-compliance with the Act:

> (a) by the person who solemnized the marriage, or
>
> (b) by the person who issued the licence for the marriage,

and the Supreme Court may, if satisfied it is proper to do so, declare that the marriage was lawfully solemnized notwithstanding any such contravention or non-compliance.

Various requirements relating to form are set in the Alberta Marriage Act. Of these requirements demanding that a licence be obtained prior to the celebration of the marriage ceremony had been the subject matter of litigation in Ontario, where a similar statute is in effect. In Alspector v. Alspector[26] it was held that although absence of a licence would expose the person performing the ceremony to criminal charges, this would not affect the validity of the marriage so

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24 Bromley, "Family Law", (Butterworth) (2nd ed. - 1962) at 66.

25 R.S.A. 1971, Chapter 226, Sec. 23.

26 [1957] O.R. 454.

celebrated, where the parties enter upon the ceremony in good faith in its validity. The Act does not make a licence condition precedent to a valid marriage. Justice McIver said:

> "There are no penalties attached on those who enter into the marriage contract under such circumstances and I have not been able to find a case that holds that the issue of the licence is an integral essential to the validity of the marriage where there is no express statutory provision rendering the marriage void in its absence."[27]

(ii) Non-Age

(a) Hindu Law

In India, the orthodox Hindus of all castes have, until recent times, insisted upon marrying away their girl before the attainment of puberty, a practice that has been adhered to even to the detriment of the parties. However, it should be pointed out that the early Dharma Sastraic materials lean in favour of adult marriages. The Vedic literature in general and the Vedic marriage ceremonies in particular[28] presuppose the adulthood of the parties. But for some unaccountable reason the age limit in the case of girls dwindled down in the period of the Sutras[29] and it was enjoined that a girl should be given away when she was a mere 'nagnika' (a girl of tender years who is unmindful of her nudity). This trend received further commendation in

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27 See also G.M. Keyes: "The Validity of the Common Law Marriage in Ontario", Osgoode Hall L. Rev. 58.

28 Kane: "History of Dharma Sastra" [1941] Vol. 2, 439 & 526.

29 Approximately from the 8th Century B.C. to the 3rd Century B.C.

the hands of Manu[30] and his followers and what began as a preference was transformed into a religious duty on the part of the father to dispose of his daughter before her puberty. Yajnavalkya[31] goes to the extent of laying down that if the father fails to marry away his daughter before puberty, he will be committing the sin of "killing an embryo".

Modern India has made repeated attempts to eradicate the practice of child marriage by raising the marriageable age under various statutes,[32] the Child Marriage Restraint Act, 1929, being the general enactment. This Act, while laying down the age limits, namely, fifteen years for the bride and eighteen years for the bridegroom, also provides penalties for the contravention of the provisions of the Act.[33] But significantly, it does not interfere with the validity of a marriage solemnized in contravention of the provisions of the Act.[34] The application of the doctrine of factum valet[35] to uphold the validity of such marriages has rendered the Act an innocuous piece of legislation.

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30 Manu's Code IX, 89 - 94.

31 Yajnavalkya's Code I, 52.

32 Indian Christian Marriage Act 1872, Section 60.
Child Marriage Restraint Act 1929, Section 2.
Special Marriage Act 1954, Section 4.
Hindu Marriage Act 1955, Section 5.

33 The Hindu Marriage Act, Section 3 - 6.

34 Munshiram v. Emperor, A.I.R. [1936] All. 11, 12.

35 Where an act is done and finally completed, though it may be in contravention of a hundred texts, the fact will stand and the act will be deemed to be legal and binding.

(b) Canadian Law

In Canada, legal incapacity to enter into a valid marriage exists where one or both of the parties are not of the required age. At common law the age of consent to marriage was 14 for males and 12 for females.[36] Provincial statutes prohibit, except under certain circumstances, as where necessary to prevent the illegitimacy of offspring, the issuing of a licence to marry or the solemnization of a marriage when either of the parties is under a certain age, usually 16 years.[37] Where a licence has been issued or a marriage solemnized in violation of such a prohibition, the marriage will not be invalid unless there is an express statutory provision to that effect or the statute demonstrates a clear intention to that end. Such a provision will be intra vires since a provincial legislature may competently attach to the absence of stipulated formal preliminaries the consequence of absolute or conditional invalidity, and the prohibition will not be interpreted as relating to capacity (a subject beyond provincial competence) where an alternative interpretation can reasonably be assumed.[38] In the case of the marriage of an infant over seven years old but below the age of

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36
Kerr v. Kerr (Ont.) [1934] 2 D.L.R. 369.
Hobson v. Gray (Alt.) [1958] 25 W.W.R. 82.

37
(Alta.) The Solemnization of Marriage Act, R.S.A. 1970 Chap. 226, Sec. 26.
(B.C.) The Marriage Act, R.S.B.C. 1960, Ch. 232, Sec. 30.
(Man.) The Marriage Act, R.S.M., 1954 Ch. 154, Sec. 22.
(Ont.) The Marriage Act, R.S.O. 1960 Ch. 228, Sec. 8 (14 years).
(Sask.) The Marriage Act, R.S.S. 1953 Ch. 302, Sec. 31 (15 years).

38
Wolf v. Wolf, 194 App. Div. 33.

legal consent it seems that, apart from statute, the marriage is not absolutely void but is voidable before or at the age of consent.[39]

(iii) Prohibited Degrees

(a) Hindu Law

In India, the question whether a marriage between two persons is within prohibited degrees must be determined upon a consideration of general principles of law, i.e. the domicile of the parties, the personal and customary law of the parties, and the rule of equity and justice and good conscience.[40] The legislatures have not laid down any prohibited degrees and thus the word does not necessarily mean the degrees prohibited by the law of England, it refers to the degrees prohibited by the customary law of the parties.[41] This has been discussed at length in the previous chapters. It is sufficient to say here that a marriage between persons within the prohibited degrees is null and void for all purposes unless it is in accordance with the custom and usage and so any delay in taking action cannot materially affect the decision in such cases as the marriage is ab initio null and void.[42]

(b) Canadian Law

In Canada, one of the essential requisites of a valid

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39 Hobson v. Gray [1958] 25 W.W.R. 82.

40 Manchanda: "The Law and Practice of Divorce" (Allh.) (3rd ed. - 1969) at 229.

41 Lopez v. Lopez [1886] 12 Cal. 706.

42 Mills v. Mills [1901] 5 Cal. W.N. CIV.

marriage is that the parties thereto shall not be related within the prohibited degrees of consanguinity and affinity. As earlier pointed out, consanguinity is relationship by blood; affinity is relationship by marriage. Prior to the enactment of Lord Lyndhurst's Act[43] which has been held to be in force in Alberta[44] the law (in England) was that a marriage between persons related within the prohibited degrees of consanguinity or affinity was voidable only[45] but that statute enacted that such a marriage shall be "absolutely null and void to all intents and purposes whatsoever." In those jurisdictions where Lord Lyndhurst's Act is in force[45A] a marriage invalidated thereby will be held invalid if the parties were domiciled therein and British subjects, even though it was celebrated in a foreign country under whose laws it was valid.[46]

(iv) Prior Existing Marriage or Bigamy

(a) Hindu Law

In India, if a second marriage is entered into by a person, during the life of a former wife or husband, it will be null and void. Such a person commits the crime of bigamy, and it does not matter in what part of the world the second marriage was contracted.[47] The

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43 (Eng.) The Marriage Act, 1835, 5 & 6 Wm. IV, Ch. 54.

44 In re Seidler and Mackie [1929] 2 W.W.R. 645.

45 Elliot and Sugden v. Gurr [1812] 161 E.R. 1064.

45A Alberta, Manitoba and Ontario.

46 Brook v. Brook [1861] 11 E.R. 703; (Marriage in Denmark of a man and his deceased wife's sister, both persons being domiciled in England).

47 Miles v. Chilton [1866] 1 Rob. Eccl. 684.

presumption of law is that a person who has been continuously absent for seven years and has not been heard of is dead. Therefore a person who marries a second time, under such circumstances cannot be held guilty of bigamy. Similarly, an honest and bona fide belief that the other partner to the marriage is dead would be a good answer to the charge of bigamy.[48]

In order to obtain a decree for nullity on this ground the petitioner must prove, not only that the former marriage is still in existence, but that it was a legal marriage. Thus, if at the time of the previous marriage one of the spouses thereto had a spouse living, such marriage being void ab initio, it would be open to the innocent party to such a marriage to treat it as a nullity and contract a fresh marriage and this subsequent marriage cannot be set aside[49] on the ground of previous invalid marriage.[50]

(b) Canadian Law

The Canadian law is the same as Hindu law. Although no one commits bigamy by going through a form of marriage if he or she in good faith and on no reasonable grounds believes his wife or her husband to be dead or if his wife or her husband has been continuously absent for the past seven years and he or she is not proved to have known that his

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48 R. v. Tolson [1889] 2 Q.B.D. 168.

49 Indian Divorce Act (Act IV of 1869) Sec. 19 (4).

50 Hudson v. Webster, 1937 Mad. 565.

wife or her husband was alive at any time during those seven years,[51] yet such marriage is invalid if, in fact, the absent or supposedly dead spouse is alive at the time of its celebration and the former marriage has not been dissolved.[52]

In England the court is now empowered, if satisfied that reasonable grounds exist for presuming death, to make a decree of presumption of death and of dissolution of marriage; and in such a proceeding the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner and the latter has no reason to believe that the other party has been living within that time is evidence that he or she is dead until the contrary be proved.[53] No Canadian statute goes that far. Moreover, in the absence of a statute empowering it to do so, the court has no jurisdiction to declare that an applicant's spouse who had not been seen or heard of over seven years should be presumed to be dead where the applicant's only reason for asking for it is that he or she wishes to marry again.[54] Such a statute has been enacted in all of the western provinces,[55] but these

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51 (Can.) Criminal Code, 1953-54, Ch. 51, Sec. 240(2).

52 English v. English (1928) 1 D.L.R. 419.

53 (Eng.) The Matrimonial Causes Act, 1965 (10 & 11 Eliz. 2 Ch. 72)

54 In re Debray (1942) 3 W.W.R. 335.

55 (B.C.) The Marriage Act, R.S.B.C., 1960, Ch. 232, Sec. 51.
(Man.) The Marriage Act, R.S.M., 1954, Ch. 154, Sec. 25.
(Sask.) The Marriage Act, R.S.S., 1953, Ch. 302, Sec. 37.
(Alta.) The present Act, The Marriage Act R.S.A. 1970, Chap. 226, Sec. 20-21. ".....the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party is living within that time is evidence that he or she is dead until the contrary is proved."

statutes being provincial acts, cannot under the Canadian Constitution authorize as the English statute does, the decreeing of the dissolution of the petitioner's marriage. Therefore, even though the issuer of marriage licences in the provinces issues a licence to a petitioner armed with such a declaration the marriage in invalid if the former spouse declared dead is in fact alive.[56] In Alberta it has been held that notice of the hearing of a petition under the Act should in all cases be given to the attorney-general of the province.[57] This in fact is now not required under the New Divorce Act of 1968.

(v) Lack of Consent

(a) Hindu Law

In India, lack of consent is a very rare phenomenon of a void transaction which is capable of being rendered valid by subsequent adoption or ratification. The distinction must be drawn carefully between; the case where there was no consent to the marriage, in which case the marriage is void ab initio but is capable of becoming unimpeachable when the non-consenting party or parties consent to the de facto marriage, and the marriage may be declared void so long as both parties have not consented by cohabitation or otherwise; and the case where consent existed, but was induced by force or fraud, for though this would make a marriage void in English law and therefore by Anglo-Hindu law it is by statute voidable only in Modern Hindu Law.[58]

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56 Tomberg v. Tomberg (1942) 3 D.L.R. 687.

57 In re Tomberg (No. 2) (1942) 4 D.L.R. 773.

58 J.D.M. Derrett: "Introduction to Modern Hindu Law" (Oxford) (1963) at 187.

If a guardian in marriage or an intending spouse is induced by dishonest misrepresentation of the identity or the quality of the other party to agree to the marriage it is the question of law in each case whether the point which was misrepresented is or is not material. Did the misrepresentation go to the root of the marriage? If, in fact, the marriage would have been agreed to even had the facts been known it seems that the marriage cannot be annulled, nor, it seems, in even stronger cases where full disclosures would have prevented the marriage; for fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with knowledge of its nature and with the clear and distinct intention of entering into the marriage in question.[59] Yet in one case misrepresentation of the legitimacy and status of the boy was held to be fatal to the marriage.[60] In others, misrepresentation of the respondent's religion was held to be a fraud rendering the marriage 'void', or more correctly voidable.[61]

In general the Anglo-American systems are divided into two camps: in one, in which the English tradition predominates, nullity will not be decreed unless the fraud negatives consent to marry the human being to whom the petitioner was married.[62] The error must be as to the person

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59 Appibai v. Khimji, (1934) 60 Bom. 455.

60 Bimlabai v. Shankerlal, A.I.R. (1959) M.P. 8.

61 Aykut v. Aykut, A.I.R. (1940) Cal. 75.

62 C. v. C., (1942) N.Z.L.R. 356.

and not, as the ecclesiastical lawyers put it, 'fortune' or 'quality'.[63] In case of impersonation the remedy is readily available[64] but it is not safe to proceed much further. Even concealment of incurable disease has been held not to be fatal to a marriage.[65] In the other camp nullity is available for misrepresentation as to chastity, health, financial responsibility, the fact of pregnancy and character as a law abiding citizen.[66]

Under the Hindu Law Marriage Act, in no case can lack of consent by reason of mistake as to the quality of the other party in respect of virginity, for example, or caste, or wealth, or state of health, be adduced as a ground for a declaration of nullity.

(b) Canadian Law

In Canada, since marriage is a contract, absence of consent will invalidate the ceremony. But a contract of marriage is not quite on the same footing as other contracts in this respect. In the first place, absence of consent, when it affects marriage at all, will apparently always make it void, whilst in the case of other contracts it will sometimes make the contract void (e.g. mistake). Secondly, some

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63 Swift v. Kelly (1835) 3 Knapp 257.

64 Allardyce v. Mitchell, (1869) 6 W.W. 45 (Australia).

65 Anath v. Lajjabati A.I.R. (1959) Cal. 778; tuberculosis was concealed and it was held that consent at the time of solemnization is the material consent.

66 Coppo v. Coppo (1937) 397 N.Y.S. 744.

factors (e.g. fraud) will not necessarily affect a marriage at all.[67] The various factors which may negative a party's consent are discussed below.

A marriage will be void if either party was so insane at the time of the ceremony as to be unable to understand the nature of the contract he was entering into. There is a presumption that he was capable of doing so, and the burden of proof therefore lies upon the party impeaching the validity of the marriage.[68] The test to be applied was thus formulated by Singleton, L.J., in the Estate of Park:[69]

> "was the (person)----------capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract."

A mistake will make the marriage void in two cases only. First, a mistake as to the identity of the other contracting party will invalidate the contract: i.e., if A marries B, believing her to be C.

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67 Bromley: "Family Law" (Butterworth), (2nd ed. - 1964) at 67, 68
See also: Henderson v. Breen (1923) 19 Alta. L.R. 545.

68 Harrod v. Harrod, (1854) 1K & J 4, 9; But if the person is proved to have been generally insane, there will be a presumption that he was insane at the time of the marriage and the burden of proof will consequently shift onto the party seeking to uphold the validity.
See also; Whittaker v. McNeilly, (1958) 23 W.W.R. 210.
Foley v. Foley (1954) 34 M.P.R. 273.
Milson v. Hough (1951) O.W.N. 450.
Singh v. Singh (1971) 2 W.L.R. 963 (arranged Sikh marriage held void)

69 (1953) 2 All E.R. 1411, 1430, C.A.

Whilst mistakes of this sort may have been more common when clandestine marriage were possible, they are of little more than academic interest now. Secondly, the marriage will be void if one of the parties is mistaken as to the nature of the ceremony and does not appreciate that he or she is contracting a marriage.[70] But if each party appreciates that he or she is going through a form of marriage with the other, no other type of mistake can make the contract void. Thus it has been held that a marriage will not be invalidated by a mistake as to other party's fortune, the woman's chastity, or the recognition of the union by the parties' religious denominations.[71]

The validity of the contract of marriage, unlike the commercial contract will not be affected by fraudulent or innocent misrepresentation itself. But if the misrepresentation induces an operative mistake (e.g., as to the nature of the ceremony) the marriage will be voided by the latter.[72]

If the consent of the party is taken by compulsion to enter into the contract of marriage which in the absence of compulsion he or she would never have agreed to, the marriage would be void. The fear may be

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70
Valier v. Valier (1925), 133 L.T. 830; An Italian who could not understand English and went to the ceremony of marriage.
Kelly v. Kelly (1932), 49 T.L.R. 99; mistaken belief that ceremony was a betrothal.
Mehta v. Mehta (1945) 2 All E.R. 690; mistaken belief that Hindu marriage ceremony was ceremony of religious conversion.
Kassim v. Kassim [1962] 3 W.L.R. 865.
Sobush v. Sobush [1931] 2 W.W.R. 900.
Singh v. Singh (1971) 2 W.L.R. 963.
Parojcic v. Parojcic (1959) 1 All E.R. 1 (fear imposed by Petitioner's father)

71
Dame Richard v. Trudel (1969) N.B.R. 983.

72
Moss v. Moss (1897) 66 L.J.P. 263, at 268-9.

due to a number of causes. For example, where the man instituted bankruptcy proceedings and threatened to shoot the woman,[73] or where the man was fraudulently made to believe that he was the father of the child she was carrying and that he would be prosecuted if he did not marry her.[74]

Thus, what matters is whether that particular party's will was overborne, and if he happens to be more susceptible to the pressure brought to bear upon him than another might be, the marriage may still be void even though a person of ordinary courage and resistance would not have yielded to it.[75]

[D] GROUNDS ON WHICH MARRIAGE IS VOIDABLE

(i) Impotency and Non-Consummation

(a) Hindu Law

In India impotency at the time of the marriage and continuing until the presentation of the petition is another ground for nullity. In both parties, impotence amounts to the same defect, namely incurable inability physically to consummate the marriage by normal coitus with or without orgasm in the female.[76] It is sufficient if one party is

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73 Scott v. Sebright (1826) 56 L.P.J. 11.

74 Griffith v. Griffith (1944) I.R. 35.

75 Webb v. Webb (1969) 3 D.L.R. 100.
Thomson v. Thomson (1971) 4 W.W.R. 383 (Q.B.).
Szechter v. Szechter (1970) 3 All E.R. 905; (marriage contracted in prison in Warsaw to enable woman to escape from Poland)
Parojcic v. Parojcic (1959) 1 All E.R. 1 (fear imposed by Petitioner's father)

76 G. Venkateswararao v. G. Nagamani A.I.R. (1962) An. P. 151.
T. Rangaswahi v. Aravindammal A.I.R. (1957) Mad. 243: a review of English, American and Indian authorities is made in this case at 245-8.

impotent in relation to the other.[77] Impotency which is curable only with all the risks of a dangerous operation, or when the respondent refuses to submit to a remedy, is 'incurable' for this purpose.[78] It is to be observed that wilful refusal to consummate as distinct from inability (whether due to physical or mental causes) to consummate is not a ground for nullity in India. Where the fact of impotence is disputed the court has jurisdiction to order a medical examination which may be refused by the respondent at the risk of the courts drawing the inevitable conclusion. The court's jurisdiction stems from the practice of English ecclesiastical courts, but is authorized by a text of the Naradasmriti.[79] Where intercourse has not taken place over a long period the court may presume the presence of impotency.[80]

Thus impotency (or incapacity) is inability to consummate the marriage. Such inability can arise from a physical defect or from a mental condition, such as invincible repugnance to the sexual act; it also happens that a person may be generally capable of having sexual intercourse, but, owing to some cause such as hysteria, is incapable of performing it with the other spouse.[81] In all such cases marriage may

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77 Kishore Sahu v. Sneh Prabha, A.I.R. (1943) Nag. 185.

78 Law reviewed in S. v. S. (1954) 3 All E.R. - 736.

79 Naradaswami XII, 8; (see A v. B (1952) 54 Bom. L.R. 725, 746).

80 F v. P (1896) 75 L.T. 192.

81 This is known as impotence quoad hunc or quoad hanc.

be annulled on the petition of either party provided the impotence exists at the time of the marriage.

(b) Canadian Law

In Canada, impotency, distinguished from conditions which make a marriage less complete or fulfilling, such as sexual weakness and frigidity[82] or sterility,[83] is generally said to be a permanent inability at the time of the marriage on the part of one of the spouses to perform the complete act of intercourse with the other.[84] The impotency which is ground for annulment of marriage is incapacity for coition.[85] Sterility, i.e., incapacity for procreation, is not in itself a ground on which a marriage can be annulled,[86] nor in Canada is non-consummation resulting merely from the refusal to consummate,[87] although it is in England;[88] but in Canada the refusal of the defendant to attempt consummation may have been so long continued or under such circumstances as to justify the inference of impotence. The inability may

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82 Long v. Long (1890) 15 P.D. 218.

83 Donati v. Church (1896) 13 N.J. 454.

84 Payne v. Payne (1891) 45 Minn 467; the court found no authority defining what constituted 'the complete act of sexual intercourse' and denied annulment where the wife was unable to experience orgasm.

85 Julien D. Payne: "Power on Divorce" (Burroughs) (2nd ed. - 1965) at 195.

86 Baxter v. Baxter: (1948) L.J.R. 479.

87 Heil v. Heil (1942) S.C.R. 160: The mere refusal of marital intercourse due to caprice is not a sufficient ground to warrant a decree in nullity.

88 The Matrimonial Causes Act, 1965 Section 9.

have physical or psychic origins,[89] and need not only relate to the other spouse: a spouse is legally impotent even if capable of performing the act with other persons.[90] It should be emphasized that the incapacity must have existed from the time of the marriage; and that it must be permanent.[91] If there is a possibility of effecting a cure by a non-dangerous operation or course of treatment the annulment will not be granted[92] unless the case is one where the defective party has unreasonably refused to, or unreasonably persists in postponing the necessary treatment or operation.[93] A curable defect is not, of course, permanent and thus not a ground for annulment.[94]

The refusal to have sexual intercourse for an extended period has been construed by some courts as giving rise to a presumption of impotency. Although the courts differ as to the length of time necessary for the presumption they agree that a substantial time is necessary. Generally the courts have been reluctant to revise a

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89 Although many statutes are counched in terms of physical impotency. See Kaufman v. Kaufman (1920) N.J. Ed. 113.

90 S v. S (1906) 77 N.E. 1025.

91 Rae v. Rae (1944) O.R. 266 at 270: the rule of incurability applies where the incapacity is due to mental causes.

92 Tice v. Tice (1957) 2 D.L.R. 591.

93 S v. S (otherwise C), 3 All E.R. 736; wherein it was held that the relevant date which determines potency is that of the hearing and not that of the presentation of petition.

94 Anonymous v. Anonymous (1916) 158 N.Y.S. 51; where the court indicated that refusal to submit to a slight operation not dangerous to the defendant's health was not a ground for annulment; however if a dangerous operation is required, the defect would be considered incurable.

presumption of impotency, except where the claim or admissions of the parties were corroborated by some other facts, such as expert medical testimony, particularly where the inference depended in part upon the plaintiff's testimony as to the defendant's incapacity. This is due to the courts fear of collusion.[95]

Only a party to the marriage can sue for its annulment on the ground of impotency.[96] It seems clear that the party who is not impotent may bring an annulment action against the defective spouse, unless barred because of the prior knowledge, laches, or ratification. The 1819 English case of Norton v. Seton[97] denied a husband's suit for annulment based on his own impotence, primarily on the doctrine of 'clean hands'. Because the husband at the time of marriage was forty-five, the court found it difficult to believe that he had no prior knowledge of his incapacity.

(c) Defenses to the Annulment for Impotency

Actions by the petitioner such as cohabiting with the allegedly impotent party subsequent to filing the annulment suit[98] or expressing the desire to resume marital relations after the discovery of the defect,[99] or delay in bringing the action have been held to

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95 "Journal of Family Law", Vol. 6, 1966, Students note at 378.

96 Eaves v. Eaves (1939) 4 All E.R. 260.

97 (1819) 161 Eng. Rep. 1383.

98 Donati v. Church (1951) N.J. 454.

99 Godfrey v. Shatwell (1955) 38 N.J. 501.

constitute ratification of the marriage and to prevent its annulment.

(ii) Pregnancy by a Man other than the Husband at the Time of Marriage

This prescribed ground in India under which a nullity petition may be presented is one introduced directly from England,[100] being a special case of fraud.[101] The respondent must have been pregnant at the time of the marriage by some person other than the petitioner and this must be proved beyond reasonable doubt. Justice Patel in Sushila v. Mahendra[102] said:

> "In matrimonial proceedings there can be no judgment by default or admission."

He quoted the words of Lord MacDermott in Preston Jones v. Preston Jones[103] and said:

> ".....In divorce as in crime the court has to be satisfied beyond reasonable doubt."

and applying it to concealed pregnancy cases he further said that

> "the consequences to the women are very serious"

Proof may consist in part of evidence from the spouse's blood groups that the husband could not be the child's father.[104] The petitioner

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100 Matrimonial Causes Act, 1960, Sec. 8(1)(d).

101 Hindu Marriage Act, 1955, Sec. 12(1)(d).

102 A.I.R. (1960) Bom. L.R. 117.

103 (1951) 1 All E.R. 124.

104 Liff v. Liff (1948) W.N. 128; the blood group tests were admitted.

must, naturally, have been aware of the facts at the time of the marriage; proceedings must have been commenced within one year of the marriage or of the commencement of the Hindu Marriage Act, whichever is earlier, and marital intercourse with the consent of the petitioner[105] must not have taken place since the discovery of the pregnancy in question,[106] for this would amount to condonation in most of the cases.

These requirements are important since pregnancy at the time of the marriage due to the petitioner himself may be relied upon by the latter at the instigation of third party or under a sense of humiliation, and it is therefore essential for the petitioner not merely to prove the pregnancy by another but also that he did not know of the pregnancy at the time of the marriage and had no intercourse with the respondent after knowing the facts from which a reasonable many would conclude that his wife was pregnant at their marriage by another man. If the burden of proof of the conditions laid down in the act were to lie on the respondent the purpose of the provision would be frustrated.[107]

[E] LEGITIMACY OF CHILDREN

(i) Hindu Law

Under general law a legitimate child is one born in lawful wedlock. It is well settled that except in the cases where special provision to the contrary is made by any enactment a marriage which is null and void

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105 Henderson v. Henderson (1944) 1 All. E.R. 44.

106 Hindu Marriage Act 1955, Sec. 12(2)(b).

107 P.S. Sivaguru v. P.S. Saroja, A.I.R. (1960) Mad. 216.

ipso jure or declared to be null and void by the court or annulled by the court on the ground of its voidability, will inevitably have the effect of bastardizing any child born of the parties to such marriage. The effect of a decree of nullity in case of a void marriage or annulment of a voidable marriage is to render the marriage null and void from its inception for all intents and purposes. It has always been extremely unfortunate for a child the putative marriage of whose parents is null and void or annulled by the court on some grounds. This was to some extent remedied in England by the Matrimonial Causes Act of 1937 and Law Reform (Miscellaneous Provisions) Act, 1949.

The legislatures in India has adopted in the Hindu Marriage Act[108] the language of the Matrimonial Causes Act 1950.[109] The provision reads as follows:

> "Where a decree of nullity is granted in respect of any marriage, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity.
>
> Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this act, such child would have been incapable of possessing or acquiring

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108 The Hindu Marriage Act 1955, Section 16.

109 The Matrimonial Causes Act 1950, Section 9.

> any such rights by reason of his not being the legitimate child of his parents."

Thus, if the validity of the marriage is challenged by either party and though challenged, the marriage is not annulled it would be a valid marriage and the children of the parties to such a marriage would undoubtedly be legitimate. And even if the marriage is annulled at the instance of either party the children born of such marriage are by operation of the above provision to be deemed to be their legitimate children for all intents and purposes except that by virtue of the proviso they cannot claim any rights in or over property of any persons other than the parents.[110] A voidable marriage can only be challenged at the instance of either party to the marriage and so after the death of one party, such marriages cannot be challenged and the children are legitimate.

Thus it is by a fictio juris that children born of a marriage void or voidable under the act are to be regarded as the legitimate children of the parents. The effect of this fiction of law is that for all intents and purposes, including rights of inheritance and succession, the children on one hand and the parents on the other are to be regarded as if the children had been the legitimate children of the parents.

(ii) Canadian Law

In Canada whether a child is legitimate or illegitimate is determined by the rules of common law as modified by modern statutes,

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110 Mulla: "Hindu Law" (Bombay) (13th ed. - 1966) at 699.

which in certain circumstances confer the status of legitimacy on some children who would otherwise be illegitimate.[111] At common law a child is legitimate only if his parents were lawfully married either at the time of his conception, even if the marriage had ended by death or divorce before his birth, or at the time of the child's birth, although he was conceived before his parents were married. Thus the fundamental test of legitimacy at common law was birth or conception in lawful wedlock. The application of this test caused hardship where a decree of annulment was granted in respect of a voidable marriage, since the retrospective operation of such a decree automatically bastardized any children of the marriage.[112] This injustice has now been eliminated in most Canadian jurisdictions by provincial legitimacy acts which provide that the children of a voidable marriage shall remain legitimate notwithstanding the issue of a decree of annulment, provided they would have been legitimate if the marriage had been dissolved instead of annulled. Legislative provision has also been introduced in several provinces whereby the status of legitimacy is conferred upon children born of parents who contracted a void marriage if

(a) the marriage was registered or recorded in substantial compliance with the requirement of the lex loci celebration;

(b) either of the parties to the marriage reasonably believed that the marriage

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111 H.B. Grant: "Family Law" (Sweet and Maxwell, London) [1970] at 140.

112 Dredge v. Dredge: [1947] 1 All E.R. 29.

was valid.[113]

[F] BARS AND DEFENCES

The ecclesiastical courts took the view that where a marriage was void ab initio, there could not be any defences to granting a declaration of nullity. Where the marriage was voidable the ecclesiastical courts developed a number of bars and defences, since the marriage was valid until one of the spouses sought to have it set aside. Since the Hindu Marriage Act and the Canadian law are based on the English law, therefore these ecclesiastical bars and defences are available in the courts of both the places. The main bars are collusion, insincerity, (i.e. where one party knew the disability of the other spouse), delay and estoppel.

(i) Collusion

This is not frequently used as a bar in cases concerning voidable marriage in India and Canada.[114] It is proposed to discuss this in detail in a further chapter.

(ii) Approbation

As in the case of any other voidable contract, where the marriage is voidable, the petitioner by his own conduct may effectively put it

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113 See for example:
(Alberta) The Legitimacy Act, 1970 Ch.205, Sec. 5.
(B.C.) The Legitimacy Act, R.S.B.C. 1960, Ch. 217, Sec. 5.
(Sask.) The Legitimacy Act, 1961, Ch. 4, Sec. 5.

114 See Pollard v. Wybourne [1828] 162 Eng. R. 732.

out of his power to obtain a decree of nullity, in which case, of course, the marriage will become valid for all purposes. 'Insincerity' was the word used in the older reports in this connection, but the word is somewhat ambiguous and it would seem better today to speak of the petitioner's approbation of the marriage.[115] The modern view was first clearly stated by the House of Lords in G. v. M.[116] Lord Selborne, L.C., speaking of the old doctrine of insincerity, said:[117]

> "I think I can perceive that the real basis of reasoning which underlines that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it: as, for instance, any act from which the inference ought to be drawn that during the antecedent time[118] the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relationship which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed..... The circumstances which may justify it are various, and in cases of this kind many sorts of conduct may exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not

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115 Tindall v. Tindall [1953] 1 All E.R. 139, 146-147.

116 [1885], 10 App. Cas. 171, H.L.

117 At page 186.

118 i.e., the time between the date of the marriage and the date of the petition.

> be other circumstances which would produce the same effect; but it appears to me that, in order to justify any such doctrine as that which has been insisted on at the bar, there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred."

Similarly, Lord Watson said:[119]

> "In a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect."

Thus it is noted that the ecclesiastical courts seem to have regarded the bar as an absolute one, the modern judicial tendency has been to regard it as discretionary, so that even though the petitioner has approbated the marriage, it is still within the court's power to grant a decree.[120] In practice, however, once approbation has been established, it is rare for the decree to be granted. This doctrine is particularly relevant where the petition is based on impotence or non-consummation, although it is applicable in other cases also but most of them have a time limit of one year.

(iii) Delay or Laches

Where one spouse comes to know of the other spouse's incapacity but does not do anything for a long time and acquiesces in the fact and then, later, seeks to invalidate the marriage the court takes the view that by

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119 Supra note 116 at 197-198.

120 Scott v. Scott [1959] 1 All E.R. 531, 535.

his delay he has approbated the marriage after he came to know of the facts; and he is barred from changing his mind later, after approbation, from seeking a decree of nullity.[121]

(iv) Estoppel

There is no well defined bar of estoppel for a voidable marriage. Usually the doctrine of estoppel is used in connection with approbation.

There are a large number of cases where the doctrine of estoppel is independently used to prevent a party from seeking to have his second or subsequent marriage declared void by the court. The kind of situation commonly found is as follows:

Husband and wife marry in Canada and are domiciled in Canada. They go abroad, to U.S.A. or elsewhere, and seek a divorce in a foreign court. One party subsequently returns to Canada. In a suit in a Canadian court concerning inheritance, maintenance or other money claims, this party now attempts to say that the foreign divorce is invalid in Canada, because the Canadian courts do not recognize it and that therefore the original marriage still subsists.

The Canadian courts generally hold that such a party is estopped from pleading that the foreign divorce is invalid.[122]

[G] SUGGESTED REFORMS

1. Decree of Nullity is of much less importance than Divorce

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121 J. v. J. [1940] 4 D.L.R. 807.

122 Reg v. Wood [1903] 6, D.L.R., 41; Burpee v. Burpee [1929] 3 D.L.R. 18; Carter v. Patrick [1935] 2 D.L.R. 811; Fife v. Fife [1965] 49 D.L.R. 648.

(Decree Nisi) and moreover the law regarding nullity is not wholly clear and satisfactory. Since the statistics of India and Canada are not available, the statistics of England are reproduced below to give an idea of the importance of nullity:[123]

PETITIONS

	1961	1962	1963	1964	1965	1966	Average
Void Marriages	73	94	63	72	69	76	75
Voidable Marriages:							
Incapacity	155	141	145	133	146	146	144
Wilful Refusal	174	169	207	164	164	196	179
Incapacity and Wilful Refusal	349	363	471	453	499	530	444
Unsound Mind or Epilsepsy	17	19	13	9	9	16	14
Pregnancy	8	18	17	16	21	23	17
Venereal Disease	5	3	3	-	3	12	4
Total	781	807	919	847	911	999	877

DECREES NISI

	1961	1962	1963	1964	1965	1966	Average
Void Marriages	32	52	61	58	70	70	57
Voidable Marriages:							
Incapacity	228	299	331	351	338	339	314
Wilful Refusal	234	176	319	295	327	318	278

123 Report of the Royal Commission on Nullity of Marriage. Working Paper No. 20 (June, 1968) at p. 3.

	1961	1962	1963	1964	1965	1966	Average
Unsound Mind or Epilsepsy	5	17	11	14	11	19	13
Pregnancy	6	8	17	10	13	14	11
Venereal Disease	1	2	2	-	3	4	2
Total	506	554	741	728	762	764	675

By way of comparison, in 1966 there were set down 46,890 petitions for divorce in England and there were made 41,081 decree nisi of divorce.[124] Keeping the above statistics in view, it is submitted that the decree of nullity should be abolished and instead, all the grounds of voidable marriage should be made as grounds for divorce. It is further submitted that these grounds should be placed in a category separate from the existing grounds of divorce because the petitioner will then not have to wait for a longer period specified for the divorce grounds.

2. In the alternative, it is submitted that if due to convention (because the decree of nullity has its origin from very ancient times) the above submission is not possible then the distinction between void and voidable marriages should be abolished. Instead a neutral term such as 'invalid' may be advantageously used. The distinction between void and voidable marriage was originally brought about by the intervention

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124 Ibid.

of the common law courts with the practices of the ecclesiastical courts in England from the 13th century onwards in order to provide a legal solution for a social problem existing in the Middle Ages in England, viz. the bastardization of children. This problem has now been solved because practically every province in Canada[125] at present and also in India[126] and England[127] has legitimization laws which provides that any children born out of a marriage which is annulled are legitimate children. Thus the use of the term such as 'invalid' which is not entrusted with an historical legal meaning would enable lawyers to look afresh at the concept of nullity.

3. It is further submitted that a marriage in which one spouse is, or both spouses are, under the prescribed age at the time of marriage should be ratifiable, instead of being void as in the case under the existing law, the reason being that if the parties marry genuinely believing that they are both of marriageable age, it is hard on them if subsequently - perhaps many years later - they discover that their marriage was void.

4. It has already been submitted that nullity should be abolished and its ground be included under divorce, yet it is possible to argue that nullity term should be retained and new grounds may be

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(Alta.) The Legitimacy Act, 1960, Chap. 56, Sec. 5.
(B.C.) The Legitimacy Act, R.S.B.C., 1960, Ch. 217, Sec. 5.
(Sask.) The Legitimacy Act, 1961, Chap. 4, Sec. 5.

126
Hindu Marriage Act, 1955, Section 16.

127
Matrimonial Causes Act 1965, Section 11.

added to it. The following additional grounds may be suggested:

(a) A spouse having been convicted of certain offences or served a certain term of imprisonment. This ground would eliminate the hard case of a man who, though not yet convicted, is on the run. It would also solve the problem where the husband immediately after the marriage tells his wife he is or was a convicted criminal.[128]

(b) The illnesses which are at present grounds for nullity are mental disorder, epilepsy and venereal disease at the time of the marriage. Other diseases which are disruptive of marital life, either because they are hereditary or because of their effect on the other spouse, may be made as express grounds for annulling the marriage.

(c) Another ground that may be suggested is a spouse's concealment of his matrimonial status. The dreams of forming a new and fresh matrimonial home remains a tragedy of

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128 A man serving a sentence of life imprisonment took permission to get married and ran away to Spain with the newly wedded wife. What if the wife did not know that he is a convict?

high intentions where a wife after her marriage discovers that her husband had been twice married and twice divorced, that he had children by both marriages and an illegitimate child by another woman. This non-disclosure at present does not give her any ground for complaint.

(d) Habitual drinking and addiction to drugs in Canada has now been made as a ground for divorce. It is suggested that this ground may be added in India as a ground for nullity, too.

(e) As already pointed out in the previous chapter, adoption poses a problem as regards marriage within the prohibited degrees. An adopted child might, after growing up, marry someone related under the chart of prohibited degrees. It is impossible to say whether, and if so how frequently, there occur these consequences, but a clause may be inserted, taking into consideration the element of chance, making such marriages valid. It may be of interest to compare the position of the adopted child in some European countries. In Finland and Poland, marriage is prohibited between the adopter and the adopted child; in West Germany and Greece, between the adopter and

the adopted child or his or her descendants; in Switzerland, between the adopter and the adopted child or the adopted child's spouse and between the adopter's spouse and the adopted child; in France and Italy between the adopter and the adopted child, his or her descendants or spouse, between the adopter's spouse and the adopted child, and between the adopted child and the adopter's natural and adopted children; in Italy dispensation can be granted to allow marriage within any of these prohibited degrees, but in France a dispensation can only extend to allow marriage between an adopted child and the adopter's natural or adopted children.

CHAPTER V

The History of Law Relating to Divorce

[A] ANCIENT HINDU LAW

Since Hindu law is a sacrament and not a contract, the inexorable orthodox Hindu rule was that a man and a woman duly married by a prescribed rite were united forever, in this world, in the next, and according to some, in all the succeeding lives to come.[1] Thus the indissolubility of marriage has been a distinguishing feature of Hindu law except where divorce and remarriage was permitted by customs among the lower castes[2] and in certain states in India where it was permitted by legislation.[3] There are divergent views on the question of divorce in the ancient texts. According to Manu[4]-

> "Neither by sale nor desertion, can a wife be released from her husband."

and in another place he says:[5]

> "Let mutual fidelity continue till death; this in few words may be considered as the supreme law between husband and wife."

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1 Srinivasan: "Hindu Law", (Allahabad) (4th ed. - 1969) at 458.

2 Jina Magan v. Vai Jethi, [1941] Bom. L.R. 538.

3 The Bombay Hindu Divorce Act [1947]; the Madras Hindu (Bigamy Prevention and Divorce) Act [1949].

4 Manu IX, 46.

5 Manu IX, 101.

Narada in his celebrated text permits a woman to remarry:[6]

> "If the husband be missing, or dead, or retired from the world, or impotent, or degraded, in these five calamities a woman may take another husband."

Though Manu declares that a man may only marry a virgin and that a widow may not marry again,[7] yet on the other hand, he appears to recognize and sanction the second marriage, either of a widow or of a wife forsaken by her husband.[8]

The option to break the marriage partnership rested heavily in favor of the husband who, if he wished for any reason to sever the marital bond, was allowed by the rite of nirakarana, "expulsion", by which he formally repudiated the woman as his spouse and ceased to have relations with her. The fate of such women was often pitiable since they were driven from the husband's home and could not find a home with their parents. On the other hand, the wife had no recourse to the privilege of separation from her husband in any circumstances and she was obliged to bear her sufferings in silence. Manu had declared that in spite of deformity, disease, drunkenness, infidelity, the husband is still a great deity.[9]

Brahminical literature has few records of divorce, but Buddhist

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6 Narada, XII, 97-101.

7 Manu, VIII, 226, V. 161-163.

8 Manu, IX, 175-176.

9 Srinivasan: "Hindu Law" supra note 1 at 454.

records do speak of them, although not in large measure. The Arthasastra of Kautilya[10] permits divorce on grounds of mutual enmity and with the consent of both the parties. If a woman divorced her husband she forfeited her proprietary rights in her father's family. If a man divorced his wife, he had to return to her whatever presents he may have received at the time of the marriage.

[B] DIVORCE ALLOWED BY CUSTOM

Though divorce was not allowed by the general Hindu law, it was in some cases permitted by custom; such custom however prevailed only in the lower classes in some districts where divorce was recognized as an established custom. It had the force of law.[11]

There was nothing immoral in a caste custom by which divorce and remarriage were permissible by mutual agreement.[12] There was no invalidity in a custom by which married couples on account of disagreement between them by consent could divorce and were divorced by parties approaching the headman and other relations, paying a certain amount and taking away the sacred thread from round the wife's neck and giving it back to the husband. It was only when the divorce was enforced against the wishes of his wife that the custom permitting the divorce would be illegal.[13]

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10 An ancient text.

11 Sankarlingam v. Subban [1894] 17 Mad. 479.

12 Jina Magan v. Bai Jethi op. cit. 2.

13 Thangammal v. Gengayammal, A.I.R. [1945] Mad. 308.

A caste custom which permitted a woman to desert her husband at her pleasure and marry again without his consent was void for immorality;[14] and it has been doubted whether the custom would be valid even if it allowed her to marry with his consent.[15]

A custom of caste by which the marriage tie could be dissolved by either husband or wife against the wish of the divorced party, the sole condition attached being the payment of a sum of money fixed by the caste, could not be recognized by the courts. It was regarded as immoral or opposed to public policy and as equally repugnant to Hindu law, which regarded the marriage so sacred that the possibility of divorce on the best of grounds was permitted only as a reluctant concession.[16] But a custom which dissolved a marriage and permitted the wife to marry again where she had been abandoned or deserted by the husband was valid.[17]

If a plaintiff relied upon customary divorce he had to allege and prove the incidents of that custom. For example, the mere writing of a letter could not dissolve a legal marriage unless it was established that that was the customary method of divorce of that particular community.[18]

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14 Narayan v. Laving, [1878] 2 Bom. 140.

15 Khemkor v. Umashankar [1873] 10 Bom. H.C. 381.

16 Keshav v. Bai Gandi [1918] 39, Bom. 538.

17 Gopikrishna v. Mt. Jaggo [1936] 63 I.A. 295, 302.

18 Repetti Bulli v. Repetti Nakalaju, A.I.R. [1958] A.P. 611.

[C] STATUTORY LAW

(i) The Native Convert's Marriage Dissolution Act 1886

This Act provided inter alia for dissolution of a Hindu marriage where one of the parties to the marriage changes his religion for Christianity and the other remains a Hindu.

(ii) The Indian Divorce Act 1869

The provisions of this Act applied to the marriages celebrated under the provisions of the Special Marriage Act (III of 1872). The object of the legislatures in enacting this Act was to place the Indian law on the same footing as the English Law of Divorce. This Act was based mainly on the principles of the Matrimonial Causes Act 1857 and the amending Act of 1859, 1860 and 1866. The object of this Act was to place the matrimonial law administered by the High Courts, in the exercise of their original jurisdiction on the same footing as the Matrimonial Law administered by the courts for Divorce and Matrimonial Causes in England.

The Indian Divorce Act applies to Christians. The petitioner or the respondent must be a Christian.[19] It is not necessary for both parties to profess a Christian religion; it is sufficient for one party to be a Christian.[20] The petitioner or the respondent must profess the Christian religion at the time of presenting the petition. The fact that the

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19 Rooke v. Rooke [1934] Bom. 230 (Beaumont C.J.).

20 The words 'or respondent' were added by Act XXV of 1927; See Sasivarnam v. Guana Sundari [1954] I.L.R. Mad. 737.

parties were married according to the Christian rites or that they were Christians at the time of the marriage will be of no avail. The determining factor is the religion at the time of presenting of the petition. There was a conflict of opinion whether this Act applies to polygamous marriages (such as a Hindu marriage at that time) as well as monogamous marriages (such as a Christian marriage) where one of the parties changed its religion for Christianity after the marriage. According to the Calcutta High Court it did;[21] the Madras High Court held that it did not.[22]

It is now to be noted that by recent statutes[23] Hindu marriages have also become monogamous, so much so, there is nothing to prevent parties married as Hindus from availing of the Indian Divorce Act after becoming converts to Christianity.

(iii) The Special Marriage Act 1954

With the advent of independence, there is afoot in India a great socio-economic revolution which has released a strong liberalizing tendency which is influencing every social and legal institution. The latest examples of how the liberal tendency has been working are the Special Marriage Act 1954 and the Hindu Marriage Act 1955.

As stated earlier in Chapter I, any person belonging to any caste

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21 Gobardhan v. Jasadamoni [1891] 18 Cal. 252.

22 Thapita v. Thapita [1894] 17 Mad. 235.

23 Special Marriage Act XLIII of 1954
Hindu Marriage Act XXV of 1955.

or community may marry under the Special Marriage Act 1954. In this sense the Act applies to all in India. Anyone can take advantage of its provisions regarding divorce, if the marriage has been performed under it. The Act constitutes a step toward a uniform civil code. The Act of 1954 repealed an earlier Special Marriage Act of 1872 which was passed to assist those Hindus who objected to some of the customary and traditional marriage rites and who desired some means of going through a form of marriage which would be legal and binding and yet would be outside the orthodox Hinduism. The Act of 1872 was very restrictive in nature and those who wanted to make use of it had to subscribe to a declaration that they did not profess the Christian, Jewish, Hindu, Mohammedan, Parsi or Jain religion. This obligation was felt to be embarassing by those who honestly professed any of these religions but at the same time wished to avoid the traditional religious rites and ceremonies necessary to solemnize marriage. In order to help such persons some amendments were effected in the Act in 1923 and 1928. In 1954, however, it was replaced by the present Special Marriage Act which was passed to provide for a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce.

It is not desirable to discuss all the grounds of divorce under the Special Marriage Act, but there is a distinctive provision,[24] i.e. divorce by mutual consent, in this Act. There is no provision for divorce by mutual consent in the Hindu Marriage Act 1955, or the Indian

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24 Section 28.

Divorce Act 1869 or even in the English Matrimonial Causes Act.[25] This provision of the Special Marriage Act 1954, provides for a divorce on the joint petition presented to the district court by both parties, the husband and the wife to the marriage, on the ground that they have been living separately for a period of one year or more and that they have mutually agreed to the dissolution of marriage. The parties seeking relief under this provision must be married under this Act. At the time of presentation of petition for divorce by mutual consent, three years must have elapsed from the solemnization of marriage and the parties should have been living separate for more than one year and the court has to be satisfied that the consent has not been obtained by force or fraud.[26] A further duty cast on the court is that it should make every endeavor to bring about a reconciliation between the parties if the nature and the circumstances of the case permit.[27]

The above provisions show that in providing for divorce by mutual consent, due care has been taken to safeguard social interests. A balance has been sought to be created between individual freedom and social control. There are ample restrictions so as to avoid hasty and thoughtless divorces. At the same time, the liberty of the individual to put an end to his marriage, if he so desires after due consideration

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25 Kumud Desai: "Indian Law of Marriage and Divorce" (Bombay) [1964] at 29.

26 Section 34(1).

27 Section 34(2).

and thought, has been secured.

It should, however, be noted that once divorce is effected by mutual consent, it cannot be revoked or annulled by mutual consent of the parties thus divorced. Marital intercourse can be resumed between the parties only after a formal remarriage. Before the final decree dissolving the marriage is passed, there is ample scope for the parties to think and reconcile and even the court has been placed under an obligation to act to that end to the extent possible.[28] In the absence of any formal decree, divorce by mutual consent is not legally operative.

(iv) The Hindu Marriage Act 1955

The traditional and conservative Hindu attitude to marriage underwent a great change under the impact of the liberalizing tendency released by Independence, with the result that the Hindu Marriage Act was passed in 1955 making provisions, inter alia, for dissolution of a Hindu marriage in certain circumstances. This Act, however, does not abrogate the pre-existing customs relating to divorce with a view to enabling people, more in the rural rather than in the urban area, to seek and obtain divorce without much formality and expense under their own customs without being driven to take recourse to costly and dilatory judicial proceedings for that purpose.

This Act does not, as such, provide for divorce by mutual consent. The Act, however, does not affect any customary right to obtain such a

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28 M.P. Jain: "The Marriage and Divorce Laws of India" in Kojiro: "A comparison of laws relating to marriage and divorce" (Tokyo) [1960] at 63.

divorce. So, where a custom recognizes a right of divorce by mutual consent, it continues to exist and is available to parties under it.

The provisions[29] relating to divorce under this Act are analagous to the English Matrimonial Causes Act, 1950.[30] The provision of divorce in this section is the first provision of a "Central Act" of this nature in relation to a Hindu marriage. According to the Hindu law, marriage was a sacrament and not a contract. This Act, no doubt, does not in so many clear terms affect the sacramental character of a Hindu marriage. The marriage under the Act is, however, not an ordinary contract. It confers a status on the parties to it and upon the children that issue from it. It has a public character.

This Act does not have cruelty and desertion as grounds for divorce. These grounds have been embodied in the provision of judicial separation[31] which have been discussed in Chapter VI.

[D] PERSONAL LAWS

(i) Muslim

Mohammedan law is very liberal in the matter of divorce by the husband. There is no restraint upon him in the exercise of such a right. This peculiarity has its root in the past history of the pre-Islamic days when the civilized concept of marriage was practically absent and

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29 The Hindu Marriage Act 1955, Section 13.

30 Matrimonial Causes Act, 1950, Section 1.

31 The Hindu Marriage Act, 1955, Section 10.

divorce was of very frequent occurrance. Islam deprecated this tendency and tried to curb it to some extent; but in essence the main structure of the Mohammedan law of divorce still remains based upon the relics of these old customs. The result, thus, is that any Muslim of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause.[32] Commenting on this point, Fyzee observes:[33]

> "The law of divorce, whatever its utility during the past, was so interpreted that it has become a one-sided engine of oppression in the hands of the husband. And almost everywhere, Muslims are making efforts to bring the law in accord with ideas of social justice."

Prior to 1939, the courts in India had denied to Muslim women any right to dissolve their marriage. A Muslim woman could not do so even if the husband neglected to maintain her, or made her life miserable. To redeem this situation, the Indian legislatures passed the Dissolution of Muslim Marriages Act in 1939 in order to consolidate and clarify the provisions of the Muslim law relating to suits for dissolution of marriage by women married under the Muslim law.

(ii) Parsis

Before 1856 Parsis, in respect of matrimonial matters, were governed by their customary personal law. In that year, the Privy Council declared that the Supreme Court of Bombay had no jurisdiction on its ecclesiastical

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32 Mulla: "Principles of Mohammedan Law" (Bombay) [1955] at 264-5.

33 Fyzee: "Principles of Muslim Law" (Allahabad) [1955] at 125.

side to entertain suits instituted by a Parsi wife for restitution of conjugal rights or for maintenance.[34] This implied that there had been no tribunal with authority to dissolve marriage on adequate cause being shown. On representation of the Parsi community, the Parsi Marriage and Divorce Act was passed in 1865. This Act was replaced by the Parsi Marriage and Divorce Act, 1936, because it was felt that the Act of 1865 needed some modifications in view of the changed circumstances and sentiments and views of the Parsi community.

(iii) Christians

As earlier stated, the law of divorce for the Christians is contained in the Indian Divorce Act, 1869. This Act was passed during the British regime and its object was to place the Indian law on the same footing as the English law of divorce. It is based mainly on the principles of the Matrimonial Causes Act of 1857 and its amendments till 1866, and it applies only where the petitioner or respondent professes the Christian religion.

[E] CANADIAN LAW

Marriage is the institution at the root of Canadian society; the family is the fundamental unit of Canada's social organization. Canada is part of the tradition of western civilization, which has always recognized marriage as monogamous and for life. Through marriage, two human beings are enabled to find mutual support and comfort and ensure

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34 Ardesser v. Perozeboye (1856) 6 M.I.A. 348.

for themselves a richer and fuller life. Society is vitally concerned in the preservation of marriage, for by fostering the institution of marriage it is preserving itself. It is not only in the interest of society, however, that marriage should be monogamous and life-long, but also in that of the parties themselves and the children. A stable family environment not only benefits society as a whole, but is essential for the well being and happiness of the individual.[35]

Nevertheless, human beings are not creatures of perfection and it is submitted that some marriages will not last for life. In almost all societies divorce has been recognized in some form. When marriage fails, no service is rendered either to society or the parties themselves by preserving the empty legal shell of a relationship that no longer exists as a fact. Divorce, therefore, cannot be eliminated from society. Divorce law should make it possible to dispense with the legal bond of matrimony when it has ceased to have any reality in fact. To quote the English Law Commission:[36]

> "If the marriage is dead, the object of the law should be to afford it a decent burial."

Before 1968, the matrimonial relief of divorce was one which was very difficult to obtain in Canada. Although the British North America Act 1867 had empowered the Dominion Parliament to enact laws concerning

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35 "Report of the Special Joint Committee of the Senate and House of Commons on Divorce" (1967) at 91.

36 The Law Commission: "Reform of Grounds of Divorce", The Field of Choice", (Cmd. 3123) p. 11.

divorce, Parliament was slow to exercise this power. As a result, for a hundred years, the authority of the courts in the various provinces to grant a divorce was derived from either the law of England, or pre-Confederation provincial statutes applicable to each province. This body of laws was not only antiquated in the societal context but also varied from province to province; legal technicalities added to the difficulties.

In British Columbia, Alberta, Saskatchewan and Manitoba, the courts had jurisdiction to grant a divorce under the provisions of the Matrimonial Causes Act 1857 (as applicable in three prairie provinces on 15th July 1870). Under this act, the ground for divorce was adultery coupled with other matrimonial wrongful behaviour. In British Columbia, certain technical difficulties concerning a decree absolute of divorce[37] were remedied by dominion legislation, the British Columbia Divorce Appeals Act.[38]

Until 1930, divorce in Ontario was not available at all. In 1930 the Dominion enactment entitled the Divorce Act (Ontario)[39] provided that the law of England concerning divorce as of 15th July, 1870, was applicable in Ontario. The Matrimonial Causes Act 1857 thus became applicable in Ontario in line with the prairie provinces.

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37 Arising from the fact that the Matrimonial Causes Act 1857 was applicable as it stood in 1859 without the amendments up to 1870.

38 R.S.C. 1952 Ch. 21.

39 R.S.C. 1952 Ch. 85.

In the three Maritime provinces the position was governed by pre-confederation colonial statutes. These statutes provided varying grounds for divorce. In New Brunswick the Act of 1791[40] provided that a divorce decree could be obtained on the grounds of frigidity, or impotence, adultery and relationship within the prohibited degrees. In Nova Scotia, in 1758, a century before judicial divorces were obtainable in England, the first legislative assembly passed a Divorce Act.[41] The grounds for divorce were impotence, relationship within prohibited degrees, adultery and desertion. In 1761 desertion was dropped as a ground for divorce by an amending Act.[42] By virtue of the British North America Act[43] the pre-confederation Act is in force today except as amended by the Dominion Acts of 1925, ch. 41, 1932, Ch. 10 (now in R.S.C., 1952, Ch. 176) and 1930, Ch. 15 (now in R.S.C., 1952, Ch. 84). This Nova Scotia statute was notable for the fact that under it, divorces a vincula were obtainable on the ground of cruelty.[44] This ground did not exist in any other province. It should also be noted that from the beginning no distinction appears to have been made between the right of a wife and that of a husband to obtain a divorce.

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40 Act "Regulating Marriage and Divorce and for Preventing and Punishing Incest, Adultery and Fornication." 31 Geo. III Ch. 5 (N.B.).

41 17 Geo. II, Ch. 17.

42 Chap. 7 of 1st Geo. III.

43 Section 129.

44 Stewart v. Stewart [1945] 18 M.P.R. 302.

Prince Edward Island, prior to and at the time of its entry into the confederation possessed a court vested with the power to entertain proceedings for divorce and matrimonial causes. By an Act passed in 1835,[45] instituled "An Act for establishing a court of divorce in this island and for repealing a certain Act therein mentioned" a court was constituted for cases of divorce and alimony.[46] This Act of 1835 remained a dead letter until 1945 when rules of practice and procedure especially applicable to the constitution of the court were promulgated.[47] In 1949 the Act of 1835 was substantially amended[48] which provided that all the powers conferred on the court of judicature by the Act of 1835 shall concurrently be held, possessed and exercised by the Supreme Court of Judicature. The Act provided frigidity or impotence, adultery and relationship within the prohibited degrees as grounds for divorce.

Thus it is noted that not only were the grounds for divorce different from province to province, but societal difficulties also existed in the western provinces because of the discrimination against women under the Matrimonial Causes Act 1857. By this Act, a man was entitled to seek divorce on the ground of his wife's adultery per se; whereas a woman had to prove in addition to adultery that the husband had also committed certain other offences such as bigamy or cruelty. The

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45 Being 5 Wm. IV Ch. 10.

46 Re - Divorce Jurisdiction, 29 M.P.R. 120 cited by Payne: 'Power on Divorce' (Burroughs) (2nd ed. - 1964) at 10.

47 Mills v. Mills [1946] 19 M.P.R. 159.

48 By 13 Geo. XI, Ch. 10.

Act thus gave a licence to commit adultery to husbands but not wives. This inequity produced societal problems and was eventually remedied in 1930 by the Dominion statute, The Marriage and Divorce Act,[49] which put wives on an equal footing with their erring husbands; the ground for divorce became adultery per se after marriage by either spouse.

The fact that divorces were hard to get was creating mounting social problems. Since a divorce through the court system was difficult to obtain, those who could afford it took the alternative route of a parliamentary divorce. Those who could not afford parliamentary divorce and did not have grounds for a court divorce found themselves in an unfortunate position. Of these, some simply took the law into their own hands; when a suitable person came along a convenient arrangement for cohabitation was made. Psychological effects on children from broken homes and parental neglect were also some factors of concern to the state. Further, the large numbers of liaisons mis-termed "common law marriages" resulted in illegitimate children and the social insecurity of the extra-legal family unit. Some also tried to obtain divorce in an 'easy' jurisdiction such as Nevada, only to find later that this decree was not recognized in Canada. Legally they were no better off than if they had never obtained a Nevada divorce; financially they suffered a loss; socially their stability was jeopardized; and emotionally all parties, children and the society surrounding them, underwent an upheaval.

Those who preferred to fight out matters in the Canadian courts were

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49 R.S.C. 1952 Ch. 176.

often hard pressed to obtain sufficient evidence to satisfy the courts that there was a cause for relief. "Hotel and Motel" divorces, with collusive or fabricated evidence created additional complications of which judges were well aware. More than twenty years before the present legislation was enacted, judges had added their voice to the social demand for reform of divorce law.

Adamson, J., later Chief Justice of Manitoba, stated in Thomas v. Thomas:[50]

> "People do make mistakes in marriage and discover too late that they cannot live together, and so separate. Under the law as it is at present, such persons cannot be divorced and given a chance to start over again upon a respectable basis unless one of the spouses commits adultery, which by some means not only comes to the notice of the other spouse but actual evidence of which also comes into the hands of the other spouse; or unless they manufacture a set of circumstances upon which the court is asked to find that adultery has taken place. This means that respectable persons who neither commit adultery nor perpetrate a fraud upon the court are without relief. The law gives relief to persons when one spouse commits adultery and engages in fraud; the law thus puts a premium upon adultery and fraud. Is this in the national interest to provide that upon separation for say two years or upwards after a genuine attempt to live together as husband and wife, a divorce might be granted upon such terms (perhaps) as should be considered just? To make an isolated act of adultery the sole and only cause for divorce is wrong in principle and vicious in practice. It is time that the

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50 [1945] 2 W.W.R. 379 - 53 Man. R. 210.

> whole matter was considered by the responsible legislative authority. The sham which takes place in the courts in many of these matters should be put to an end."

Thus the combination of social problems, public and judicial pressure and pressure on parliamentary time finally forced parliament to undertake reform of divorce laws.

[F] PASSAGE OF THE DIVORCE ACT THROUGH PARLIAMENT

Over the years, many members of the Canadian Parliament tried to introduce private bills for divorce reform[51] but none of them was successful. Finally in March 1966 a special Joint Committee of both Houses of Parliament, under the co-chairmanship of (ninety year "young") Senator Arthur W. Roebuck and Mr. A.J.P. Cameron, was appointed to examine the question, soon after Senator Roebuck had introduced yet another divorce reform bill in the Senate. Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel of the Senate started the ball rolling with the following words on June 28, 1966:

> "This planet has turned on its axis many times since 1857 when the grounds for divorce in most Canadian provinces were established. I might add that the present law of divorce in Canada is a curious and somewhat delicate mosaic which has been adjusted from time to time in a piecemeal, pragmatic and perhaps, typically Anglo-Saxon manner, and that any further improvement in its design will require not only a steady hand but a fine chisel indeed. There will be needed also a sort of liquid cement compounded of caution and confidence in equal parts."

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51 e.g. Senator Walter M. Aseltine in 1938 and 1955.

The Committee prepared 21 recommendations for divorce law reform based on briefs, discussions and meetings with church groups and other groups representing a wide cross-section of Canadian society. In December 1967, Minister of Justice Pierre Elliott Trudeau, as he then was, introduced a bill into Parliament for the reform of divorce laws. Upon introduction of the bill in the Parliament, Mr. Trudeau, although chivvied by members with being a bachelor and a "swinger" was congratulated for his initiative in tackling a subject which had long been regarded as a sacred cow. In the course of his remarks, he stated that it had become necessary to bring the law more into line with the present social climate, while leaving the family surrounded with maximum protection, and to achieve the desired reform without violating or offending federal-provincial relationships. On the second reading of the bill the minister admitted that many marriages would not break down if poverty, slums, alcoholism, etc., were removed, but he pleaded that everything could not be attended to at once. Pending the elimination of these basic ills, a beginning could at least be made by curing the symptoms. It was further stressed by the minister that the new law was designed not only to make divorce easier, but to salvage marriages wherever possible. This latter purpose is considered at least as important as giving a legal burial to marriages which have died. On 19th December, 1967 it was passed by the Commons (with negligible amendments) and by the Senate the following January, to become the Divorce Act, 1968. It was labelled a Christmas present for the 500,000 persons estimated by the Canadian Bar Association as being virtually forced "to live common law" under the existing laws.[52]

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52 Chapman: "Law and Marriage" (McGraw-Hill) (1968) at 74.

The new law does more than extend the marital offences upon which to sue for divorce. It introduces the concept of a permanent marriage breakdown, one of the first on this continent to do so. This concept was the one which a study group organized by the Archbishop of Canterbury recommended in 1966 in a report entitled 'Putting asunder', as being the only ground for dissolving a marriage. This was also the view expressed to the Parliamentary Joint Committee in a combined brief of all the major Canadian churches and advocated throughout the passage of the bill by Mr. Brewin.

The new law has not, however, swung completely from the old principle of marital offences to this new concept of marriage breakdown. It is a composite Act, recognizing not only marital offence but also numerous situations which result in a marriage disintegrating through no fault, necessarily, of one person in particular. The consequence of this is that divorce need no longer be considered a dirty word. The reason given for not swinging over completely to the new principle was that it would place "too broad, undefined and uncontrolled discretion"[53] in the hands of a judge whose duty it is to decide when a marriage has actually broken down, and that more uniformity in the granting of divorces could be achieved if parliament spelled out fairly definitely the exact grounds on which a marriage should be considered as broken down.

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53 Chapman: "Law and Marriage" (McGraw-Hill) (1968) at 76.

[G] THE PRINCIPLE ON WHICH DIVORCE IS AT PRESENT GRANTED

The grounds for divorce under the Divorce Act, 1968, reflect two philosophies or viewpoints of the manner in which a marriage may be legally terminated. The first is the traditional philosophy of matrimonial fault[54] - where one of the spouses has committed a matrimonial fault the other spouse (generally termed the "innocent" spouse) is entitled to such matrimonial relief. The second is the philosophy of marriage breakdown[55] - where the marriage has ceased to exist or 'broken down'. In India, under the Special Marriage Act[56] and Hindu Marriage Act[57] only the first type of grounds are available, whereas in England breakdown of marriage is the sole ground of divorce.[57A]

(i) The 'Matrimonial Fault' Approach

The concept of matrimonial relief prior to 1968 was based solely on 'fault' in Canada. Special rights and duties were conferred upon the parties by the contract of marriage. Breach of any of these rights or duties gave a right to the innocent or the injured spouse to seek matrimonial relief freeing him from his duties under the contract. The joint committee took the view that the fault concept was well understood

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54 The Divorce Act (Canada) 1968 Section 3.

55 The Divorce Act (Canada) 1968 Section 4.

56 The Special Marriage Act 1954, Section 27.

57 The Hindu Marriage Act 1955, Section 13.

57A Matrimonial Proceedings Act, 1960, Section 1(1).

by the public in Canada and hence retained its social value as a relief in the context of family law. The committee considered that most people in Canada today hold the view that certain acts by spouses such as adultery, cruelty and desertion constitute major matrimonial offences entitling the innocent injured party to seek a divorce. Accordingly, the joint committee recommended in its report that adultery, the sexual offences of rape, sodomy, bestiality, cruelty and desertion should be treated as matrimonial faults for the purpose of forming grounds for divorce; and further suggested, in the draft bill appended to their report, that a bigamous marriage, wilful refusal to consummate the marriage and wilful non-support of wife and children should also constitute 'faults' entitling the injured spouse to the relief of divorce.

The provision in the act relating to the matrimonial fault read as follows:[58]

> "A petition for divorce may be presented to a court by a husband or wife, on the ground that the respondent, since the celebration of marriage,
>
> (a) has committed adultery;
>
> (b) has been guilty of sodomy, bestiality or rape, or has engaged in a homosexual act;
>
> (c) has gone through a form of marriage with another person; or
>
> (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses."

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58 Section 3 (a to e).

(ii) The "Marriage Breakdown" Approach

This approach of divorce law puts the legal relief in the perspective of sociological and psychological conditions. Where the marriage has ceased to exist in substance (from any cause or causes) it has in effect "broken down". Since many marriages fail through no fault of either partner, as parties to the marriage may be just fundamentally incompatible, the joint committee took the view that marriage breakdown should be considered as a ground for divorce. According to this viewpoint or philosophy, divorce is not to be treated as a legal relief to be dispensed to an innocent spouse as a balm for the hurt suffered because of the wrongful action of the guilty spouse. The idea of matrimonial fault by one of two spouses is completed discarded. Here the idea is that marriage as a social institution revolves around the spouses as the kernel of the family unit. Where the marriage has broken down, and no longer exists in the social sense, and the spouses are leading separate lives and living apart, then legal acknowledgement should be given to this state of affairs and the erstwhile "marriage" should be legally terminated, i.e. a change in the legal status of the parties should be effected which reflects their factual social status. According to the sociological jurisprudence from which this philosophy stems the cause of breakdown could be the fault of both parties or neither; it could be through circumstances which cannot be controlled by either party. Whatever may be the cause, the fact remains that a marriage has broken down, and it is to this fact situation that the law addresses itself, for reasons of sociological interest, to give some legal relief which would acknowledge the social fact for what it is.

In the United Kingdom, before the commencement of the Divorce Reform Act 1969 on January 1, 1971, the principal grounds for divorce were adultery, desertion and cruelty. In other words the English law of divorce was based on the principle of matrimonial offence by one of the parties to the marriage which was the subject matter of the divorce. Since that date the irretrievable breakdown of a marriage has become the sole ground for dissolving it. In the words of the statute itself:[59]

> ".....the sole ground on which a petition for divorce may be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably."

The provision[60] in the Divorce Act (Canada) 1968 reads as follows:[61]

> [1].....a petition for divorce may be presented to a court by a husband or wife where the husband and wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances as specified in the petition, namely:
>
> (a) the respondent
>
> (i) has been imprisoned, pursuant to his conviction for one or more offences, for a period or an aggregate period of not less than three years during the

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59 The Divorce Reform Act 1969, 17 Eliz. II Ch. 55, Sec. 1.

60 This has been borrowed from the Australian Matrimonial Causes Act 1959, Sec. 28.

61 The Divorce Act (Canada) Section 4.

five-year period immediately preceding the presentation of petition; or

(ii) has been imprisoned for a period of not less than two years immediately preceding the presentation of the petition pursuant to his conviction for an offence for which he was sentenced to death or to imprisonment for a term of ten years or more, against which conviction or sentence all rights of the respondent to appeal to a court having jurisdiction to hear such an appeal have been exhausted;

(b) has, for a period of not less than three years immediately preceding the presentation of the petition, been grossly addicted to alcohol, or a narcotic as defined in the Narcotic Control Act, and there is no reasonable expectation of the respondent's rehabilitation within a reasonable foreseeable period;

(c) the petitioner, for a period of not less than three years immediately preceding the presentation of the petition, has had no knowledge of or information as to the whereabouts of the respondent and, throughout that period has been unable to locate the respondent;

(d) the marriage has not been consummated and

the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage or has refused to consummate the marriage;

(e) the spouses have been living separate and apart

(i) for any reason other than that described in subparagraph (ii), for a period of not less than three years; or

(ii) by reason of the petitioner's desertion of the respondent, for a period of not less than five years immediately preceding the presentation of the petition.

The provisions[62] regarding the granting of the divorce under the Hindu Marriage Act 1955 are as follows:

(1) Any marriage solemnized may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

(i) is living in adultery; or

(ii) has ceased to be a Hindu by conversion to another religion; or

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62 The Hindu Marriage Act 1955, Sec. 13.

(iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or

(iv) has for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or

(v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; or

(viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree of judicial separation against that party; or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

The following two additional grounds are available to the wife:

(1) That the husband has since the solemnization of marriage been guilty of rape, sodomy, or bestiality.

(2) In the case of any marriage solemnized before the commencement of this Act, that the husband had married before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner: provided that in either case the other wife is alive at the time of the presentation of the petition. (Section 13(2)(i).

It is open to the court to entertain a petition for dissolution of a marriage within the first 3 years of marriage in any case of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent and in such cases the court has to take into consideration the interests of the children of the marriage, if any, and the possibility of reconciliation between the parties. (Section 14).

(iii) Summary

The following table gives a brief outline of the grounds available for divorce in India and Canada.

INDIA	CANADA
COMMON GROUNDS	
1. Living in adultery	1. Adultery
2. Rape and Unnatural offences (ground available to wife only)	2. Rape and Unnatural offences
3. Bigamy (ground available to wife only)	3. Bigamy
4. Desertion (ground for Judicial Separation and not for divorce)	4. Desertion (marriage breakdown)
5. Cruelty (ground for Judicial Separation and not for divorce)	5. Cruelty
6. Imprisonment	6. Imprisonment
7. Disappearance (7 years)	7. Disappearance (3 years)
8. Failure to comply with a decree of restitution of conjugal rights	8. Failure to comply with a decree of restitution of conjugal rights (ground for Judicial Separation and not for divorce).
ADDITIONAL GROUNDS	
1. Conversion of Religion	1. Gross addiction to alcohol or Narcotics
2. Insanity for 3 years	2. Non-Consummation of marriage
3. Leprosy or Venereal Diseases	3. Living Separate and Apart (marriage breakdown)
4. Renounciation of world	
5. No resumption of cohabitation after two years of decree of judicial separation.	

Since the concept of 'marriage breakdown' is not in the Hindu Marriage Act, the provisions of the Canadian Divorce Act, relating to

'marriage breakdown' may be considered as additional grounds of divorce.

The Hindu Marriage Act 1955 and the Canadian Divorce Act 1968 are comparatively new legislation. A considerable body of case law had already developed around the grounds for divorce under the Matrimonial Causes Acts. Thus by using terms of act such as 'guilty of adultery' or 'cruelty' the draftsmen, have drawn upon notions and concepts already prevailing in the common law world in this branch of law. Each of these concepts is well understood and has a definite meaning within the context of matrimonial law as practiced in common law jurisdictions. Hence, for the purpose of judicial interpretations of these statutes, it would be a reasonable inference to deduce that the draftsmen, by drawing upon such concepts, intended that the exact term or word used in these statutes should bear the meaning it already bears - together with the refinement in the ambit of the concept through judicial interpretations in other common law jurisdictions in the given context.

It is for these reasons that the common grounds of divorce in India and Canada in the next chapter are discussed together with reference to Indian, Canadian and English cases and the additional grounds are discussed under separate heads.

CHAPTER VI

Grounds for Divorce

Marriage is not an ordinary contractual relationship. Few people have considered it as such in the past and few even today have this view. Marriage is not only a contract with which society is vitally concerned, but one which has to most Indians and Canadians a deep religious significance as well. Though marriage is the foundation of the family and of social organization and should be essentially monogamous and for life, yet some marriages do fail and irrestrievably break down. Once this happens nothing is gained by preserving the empty shell. It is said:[1]

> "For most people, divorce is a step two adults take when their marriage fails. Although others obviously are affected, the impact of divorce is seen largely through the eyes of the man and woman. Actually the penetrating roots of marriage are exposed through the effect of its disintegration on children, relatives and friends. The fact is that most.....divorces occur in families with children. As a result, one out of six youngsters grows up today in homes either anticipating, experiencing or reverberating from divorce."

Divorce is commonly seen as the end of a relationship, the beginning of a "new life" - as a final closing of an unfruitful marriage - as a correction of error that sets the "books straight". Actually divorce is an adjustment of relationship that does not erase the past nor create an unrelated future. Divorce legally dissolves the

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1 Westmen and Cline: "Divorce is a Family Affair" [1972] 4 R.F.L. 310.

marriage, but it only realigns the material and intangible bonds between the affected parties.[2]

It is proposed to discuss in this chapter what grounds does the law give to an injured spouse to remove himself or herself from the empty shell. The grounds on which the court may grant a decree of divorce are discussed below.

[A] ADULTERY

Adultery may be defined as consensual sexual intercourse between a married person and a person of opposite sex not being the husband or wife of that married person. As the intercourse must be consensual, a woman who has been raped is not guilty of adultery;[3] but if a husband petitioner proves that intercourse took place between his wife and co-respondent, the burden of proof then shifts to the wise to prove that the intercourse took place against her will in the course of a rape committed on her by the co-respondent.[4] It appears from Yarrow v. Yarrow[5] that the insanity of the respondent might be a defence to a charge of adultery if at the time of the act he was so insance as to be incapable of appreciating the nature of the act and its probable consequences, but a warning was given in that case[6] that insanity which

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2 Westman and Cline: "Divorce is a Family Affair" Ibid.

3 Clarkson v. Clarkson [1930] 143 L.T. 775.

4 Redpath v. Redpath [1950] 1 All E.R. 600 (C.A.).

5 [1892] p. 92.

6 Ibid. by Sir Charles Butt P., at 94.

would entitle an accused to an acquittal on a criminal charge would not necessarily be a valid defence to a suit for divorce on the ground of adultery.

As a ground for divorce, adultery must have been committed during the marriage; ante-nuptial incontinence is not sufficient.[7] Acts of voluntary sexual intercourse, falling short of complete intercourse may be sufficient to justify a finding of adultery.

Adultery was the sole ground for divorce in Canada before 1968[8] and continues to be a ground under the Divorce Act 1968.[9] Since the Act specifically repeals all other 'laws', it would appear that the case-law on adultery which had developed prior to 1968 is applicable to the provision of the Divorce Act.

in Chouinard v. Chouinard,[10] a case decided under the new Divorce Act, the New Brunswick court followed the English case of Redpath v. Redpath[11] and was concerned whether an attempt to commit adultery or mere sexual gratification can amount to adultery.[12]

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7 Patou v. Patou [1847] 28 N.Z.L.R. 840.

8 See Matrimonial Causes Act, 1857, applicable in Alberta.

9 Divorce Act (Canada) 1968, Section 3(a).

10 [1969] 1 N.B.R. 941.

11 [1950] 1 All E.R. 600.

12 This question was also discussed in Orford v. Orford [1921] 49 O.L.R. 15 "The essence of the offence of adultery consists not in the moral turpitude of the act of sexual intercourse but in the voluntary surrender to another person of the reproduction powers and any submission of these powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of 'adultery'."

There must be at least partial penetration for the act of adultery to be proved. The attempt to commit adultery must not be confused with the act itself, and if there is no penetration some lesser act of sexual gratification does not amount to adultery..... It is the inception of the adultery and not its repetition that is material event: It may be an isolated act.[13]

The legislature in India has taken the view that a single act of infidelity to the marriage bond should not be sufficient ground for relief by way of a decree of divorce but should only be a ground for judicial separation.[14] The present provision[15] rules that a decree for divorce may be sought on the ground that the other party is living in adultery. A single act of adultery, therefore, cannot amount to living in adultery within the meaning of the provision.

Thus, adultery can only be a successful ground in a divorce case in India if it is proved that the spouse is living in adultery. Isolated acts do not amount to "living in adultery". A plaintiff who alleges that the defendant lives in adultery has to prove a course of the conduct over some period with repetition of adultery, with the same or more than one person.[16] The phrase 'living in adultery' was considered

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13 Chouinard v. Chouinard, supra note 10.

14 The Hindu Marriage Act, Section 10, if: "after marriage either party had sexual intercourse with any other person than his or her spouse."

15 The Hindu Marriage Act, Section 13(i)(a).

16 Subramaniyam v. Ponnak Shiammal, A.I.R. [1958] Mys. 41.

at a great length by Vyas J. in Rajni v. Prabhakar[17] as follows:

> "Living in adultery means a continuous course of adulterous life as distinguished from one or two lapses from virtue. 'Is living' cannot mean 'was living'. If these words are to be construed in a narrow way the purpose of the Act is frustrated."

The judge, after considering the old authorities,[18] observed:

> "The intention of the legislature was to relieve a spouse from being tied down to an abject and agonizing life with a partner who was living in adultery with another person.....and this intention could be defeated if a spouse, proved to have been living in adultery about the time the petition was filed, could successfully plead from temporary cessation from such life immediately prior to the petition as a ground for refusing a decree for divorce..... On the other hand it is clear that too loose a construction must also be not put on these words, it would not be enough if the spouse was living in adultery some time in the past but had ceded from such life for an appreciable duration. It would not be possible to lay down any hard and fast rule about it.....for it must show that the period during which the spouse was living an adulterous life to the filing of the petition that it could be reasonably inferred that a petitioner had ground to believe that when the petition was filed, she was living in adultery."

Thus if there is a proof of only a single act of adultery, the court will only grant a decree for judicial separation and not a decree of dissolution of marriage.[19]

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17 A.I.R. [1957] 59 Bom. L.R. 1169.

18 In re Fulchand Maganal, A.I.R. [1928] Bom. 29; Kista Pillai v. Amrithammal, A.I.R. [1938] Mad. 833.

19 Bhagwan Singh v. Amar Kaur, A.I.R. [1961] Punj. 144.

(ii) Standard of Proof

Since matrimonial causes are civil suits, the standard of proof in a divorce proceeding is for most purposes (i.e. where no question regarding legitimacy of offspring arises) the same as in other civil proceedings. This was stated by the Supreme Court in Smith v. Smith[20] before 1968, and remains true after 1968 since the Divorce Act has not changed the standard of proof. The rule of 'preponderance of probability' is applicable. For certain purposes, e.g. where a finding of adultery would have the effect of bastardizing a child, a heavier burden of proof is laid on the petitioner; in such circumstances adultery must be proved beyond reasonable doubt, on the criminal standard of proof. This was so before 1968[21] and continues so after the Divorce Act.[22]

Lord MacDermott in the leading case of Preston Jones v. Preston Jones,[23] stated the test as follows:

> "The evidence, no doubt, must be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy.....the

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20 [1952] 3 D.L.R. 449. The S.C. of Canada disapproved dicta in an English case, Churchman v. Churchman [1945] p. 44 where the criminal standard of proof was required in divorce suits.

21 Himmelman v. Himmelman [1959] 19 D.L.R. 291 (N.S.S.C.).

22 Loewen v. Loewen [1969] 68 W.W.R. 767 (B.C.S.C.); the B.C.S.C. approved the two English cases on the standard of proof - Preston Jones v. Preston Jones [1951] A.C. 391, Irish v. Irish [1958] 28 W.W.R. 671 B.C.

23 [1951] A.C. 391, 417.

> guarded discretion of a reasonable and just man; but these desiderate appear to me entirely consistent with the accpetance of proof beyond reasonable doubt as the standard required. Such in my opinion is the standard required by the statute..... The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry .....I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law.... The true reason, as it seems to me, why both accept the same general standard - proof beyond reasonable doubt lies not in any analogy, but in the gravity and public importance of the issues with which each case is concerned.

Damages in adultery suits against the co-respondents are awarded not as a punishment for misconduct, but to compensate the petitioner for the loss or injury he or she has sustained by that misconduct.[24] It follows, therefore, that damages are not to be calculated on an exemplary or punitive basis, but the injury to the petitioner's feelings, the blow to the petitioner's honor, and the hurt to his or her family life have to be considered.[25]

(ii) Suggested Reforms

Adultery strikes at the root of the institution of marriage and in consequence has from time immemorial been recognized as a valid ground for divorce in those societies which accept divorce. The basic pledge in the marriage bond is that the parties will keep exclusively one to another.

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24 Butterworth v. Butterworth [1920] p. 126.

25 Tranter v. Tranter [1925] N.Z.L.R. 593.

A husband can have but one wife and a wife but one husband. Should either a husband or wife depart from the standard of marital fidelity the other should have the right to a divorce and immediately so, if he or she wishes. But this is not the case in India because the statute requires 'living in adultery' and does not take into consideration the isolated acts of adultery. It is suggested for India that a single isolated act of adultery should be enough to constitute a ground for adultery. The offence is adultery and so far as the offence is concerned it does not make any difference whether it is a course of conduct or an isolated act. The Indian society in general is very conservative. Considering the cultural background of this conservative society it is advisable to change the language of the statute by inserting the words 'has committed adultery' instead of 'living in adultery'.

[B] RAPE AND UNNATURAL OFFENCES

(i) Canadian Law

Prior to 1968, the "unnatural offences" of rape, sodomy and bestiality were available as grounds for divorce to a wife but not to a husband, in the prairie provinces and British Columbia, and after 1930 in Ontario, where the Matrimonial Causes Act 1857 was in force. The Joint Committee recommended[26] that these 'offences' be retained as grounds for divorce at the insistence of either spouse. These unnatural offences now constitute grounds for divorce at the instance of an innocent husband or wife.

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26 Report of the Special Joint Committee on Divorce, 1967, at 105.

By definition, "rape" is included in the offence of 'adultery' since it offends against the 'exclusive' nature of the matrimonial duty to reserve sexual organs solely for the use of the other spouse. In concept, the only real difference between rape and adultery is that in one there is no consent and in the other there is consent. To overcome this conceptual difficulty so that the offence of rape could be included in the offence of adultery, the Barristers Society of New Brunswick suggested the following definition of adultery:[27]

> "The commission of an act of sexual or deviate sexual intercourse voluntarily performed by the defendant after marriage with a person other than the plaintiff (petitioner) or with an animal."

The definition is comprehensive enough to include all five of the present offences of adultery, sodomy, bestiality, homosexuality and rape.

Since under the contract of marriage there is a matrimonial obligation to cohabit and consummate the marriage, it would appear that it is legally not possible for a respondent to 'rape' his wife. The respondent may in fact be forcing his sexual attentions upon an unwilling petitioner but it is submitted that this does not constitute rape for the purposes of the Divorce Act.

Black's Law Dictionary defines sodomy as 'carnal copulation by human beings with each other against nature' but thereafter continues,

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27 Proceedings of the Joint Committee. List of hearings and witnesses. No. 15, Feb. 4, 1967. Page 804. Also Joint Committee Report, p. 105.

"But strictly speaking it should be used only as equivalent to 'pederasty', that is, sexual act as performed by a man upon the person of another man or boy (or a woman) by penetration of the anus."

In the English law[28] where the petitioning spouse consents to sodomy, the petition is barred, but the burden of proof for showing the petitioner's consent is on the respondent;[29] and where the petitioner is the wife, mere submission on her part to an act of sodomy with her husband may not amount to real consent such as would bar her petition.[30] In Canada, in view of the provisions of the Divorce Act,[31] the mere admission of one spouse or the other would be insufficient evidence of this offence committed inter-spousely.[32]

Sexual intercourse between a man and an animal constitutes the offence of bestiality. Medically and psychologically it is an extreme form of homosexuality.[33] There are no cases hitherto under the Divorce Act 1968. Corroboration was not required to prove an allegation of

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28 For connivance or Condonation see Sec. 9(1)(c) Divorce Act Chapter VII; also See I v. I [1964] P. 85 (C.A.)

29 Keogh v. Keogh [1962] 1 All E.R. 472.

30 Fast v. Fast [1945] 3 W.W.R. 66 B.C.S.C.

31 Divorce Act (Canada) Section 9(1).

32 See however F v. F [1950] 2 W.W.R. 54 (Alta.); Warden v. Warden [1951] O.W.N. 381; decided prior to the enactment of the Divorce Act.

33 Reuben: "Everything you always wanted to know about sex" Ch. 8.

bestiality prior to 1968[34] but it is doubtful if this is so today in view of the provisions[35] of the Divorce Act. The statutory privilege against self-incrimination for adultery is not available for bestiality.[36]

The Divorce Act is not clear on the meaning attached to the term "has engaged in a homosexual act". In C v. C[37] the Ontario Court indicated transvestitism was not included within the meaning of the term. At the conference of Ontario judges on the Divorce Act, the annotated compilation of cases produced by His Honor Judge R.W. Reville indicated that lesbianism would be included. At that time the tentative definition of homosexuality suggested on the basis of Countway v. Countway[38] is a restrictive one confined to "acts between members of the same sex which involve the surrender of the sexual organs." It is clear now that lesbianism is included within the definition of Section 3(b) of the Divorce Act.[38A]

(ii) Hindu Law

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34 A v. A [1925] 2 D.L.R. 1195.

35 Supra note 31.

36 G v. G [1956-57] 20 W.W.R. 352.

37 [1969] 2 O.R. 786; [1970] 7 D.L.R. 3d. 35.

38 [1968] 70 D.L.R. 2nd 73 (N.S.) Homosexuality is treated in English law as a ground for divorce only if it affects the other spouse's health and this amounts to cruelty.
See also C v. C [1970] 2 N.B.R. 2nd 187.

38A M v. M [1972] 24 D.L.R. 114 (P.E.I.); Section 3(b) of the Divorce Act reads as follows:-

> "respondent since the celebration of marriage has been guilty of sodomy, bestiality or rape, or has engaged in a homosexual act;"

The provisions of these unnatural offences in the Hindu Marriage Act[39] are analagous to a provision of the English Matrimonial Act, 1950[40] and it lays down that a wife may present a petition for divorce if the husband is, after the solemnization of their marriage guilty of any of the offences of rape, sodomy or bestiality. Homosexuality is not a ground for divorce in India. If the husband was guilty of any of the offences prior to the petitioner's marriage, the petitioner cannot claim a divorce. The offence must be subsequent to the petitioner's marriage.

The concept of these offences is the same in India as under the Canadian law, the only difference being in regard to the spouse to whom this relief is available. As mentioned above, these are the additional grounds available to the wife to present a petition. If, however, these unnatural offences of sodomy or bestiality are directed against the wife, causing actual apprehended injury to her health, it may amount to legal cruelty. The provisions of the Indian Penal Code[41] make these unnatural offences as criminal offences committed by male or female.

(iii) Suggested Reforms

It may be pointed out that the court may grant a divorce to a wife, but not to a husband in India, on the ground that the other spouse has been guilty of sodomy or bestiality. Occasionally, however, a husband

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39 The Hindu Marriage Act Section 13(27)(ii).

40 English Matrimonial Causes Act 1950, Section 1.

41 Indian Penal Code, Sec. 375, 377.

has been able to obtain relief on the ground of cruelty, because his wife has been guilty of such unnatural practices. The woman can be charged with the commission of the acts of this nature under the criminal law. The Divorce Act of Canada makes no distinction between male and female in granting relief. Moreover, in allowing a wife to obtain a divorce on the ground of an act of sodomy committed by her husband on her person, the divorce law has recognized that sodomy may take place not only between males but between a male and a female. It is suggested that the husband and wife in India should now be placed on the same footing, and either spouse should be able to obtain a divorce on the ground that the other spouse has been guilty of sodomy or bestiality.

[C] BIGAMY

The Criminal Code of Canada[42] and the Indian Penal Code[43] make bigamy or polygamy a criminal offence in Canada and India. It is thereby conferred a matrimonial right upon persons to have exclusive enjoyment of the consortium of the other spouse whilst a valid contract of marriage subsists. It also imposes a duty on each spouse not to breach or violate this exclusive right by any form of conduct. A purported marriage or mode of marriage with a third party constitutes a violation of such right. It should, however, be noted that this ground in India under the Hindu Marriage Act is again an additional ground for divorce

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42 Canada Criminal Code, Sec. 240-245.

43 Indian Penal Code, Sec. 470-475.

for the wife, because under the provisions[44] it is only she who can bring an action.

[D] CRUELTY

Cruelty perhaps is the most controversial offence of all the matrimonial offences. The existence of cruelty is a question of fact and each case must be considered in the light of its own particular circumstances. This is one of the reasons that the cases on cruelty have been decided without unity of thought.[45] That is why the judges have not defined cruelty, and the question whether the acts complained of amount to legal cruelty or not is a mixed question of fact and law.[46]

The former view, that to constitute cruelty there must be conduct which is in some way aimed by one spouse at the other, was held to be erroneous by the court of appeal in Gollins v. Gollins.[47] In this case a general statement of the law relating to intention was made and may be summarized as follows:[48]

> "Only generalizations that may safely be made to cover all cases of cruelty are that the petitioner must show actual or probable

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44 Hindu Marriage Act, Sec. 13(2)(i): (A wife may also present a petition..... (i)..... that the husband had married again.....)

45 S.P. Khetarpal: "The Modern Concept of Cruelty" (1964) Malaya L.R. - Vol. 6, p. 303.

46 Tomkins v. Tomkins (1858) 1 Sw. & Tr. 168.

47 (1963) 3 W.L.R. 176.

48 Ibid.

> injury to life, limb or health and that no court will give relief in respect of mere trivialities or incompatibility of temperament. Thereafter, all that can be said is that much will depend upon the respondent's knowledge and intention, the nature of his or her conduct on the character and physical or mental weaknesses of the spouses."

(i) Definition and the Concept of Cruelty

The term cruelty is incapable of definition. Ad hoc interpretations of the meaning of this term in the context of particular cases are numerous. In England the law relating to cruelty was much confused so that in the Divorce Reform Act 1969[49] the use of the term was dropped. Further, the concept of cruelty in the Divorce Act of Canada is different from both English case law, and statutory laws and case laws in each province.

(a) Physical and Mental Cruelty

In English law, the test of cruelty as stated in the famous case Russell v. Russell[50] required that the respondent's conduct should have caused "danger to life, limb or health, bodily or mental, or a reasonable apprehension of such danger". In Canada this strict definition has been rejected. In the first case decided under the ground, Delaney v. Delaney,[51] the British Columbia court stated that the Russell

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49 Divorce Reform Act 1969, Eliz. II, Ch. 55, Sec. 2(c).

50 (1897) A.C. 395, Eng. H.L.

51 (1969) 1 D.L.R. 3rd 303: See also Knoll v. Knoll (1969) 6 D.L.R. 300, 201 (Ont.).

test of cruelty continued under the new act. In the second case decided under this ground, Zalesky v. Zalesky,[52] Tritschler, C.J., of the Manitoba Court of Queen's Bench, stated that the Russell test was not applicable in Canada. He stated:

> "in considering whether there has been proof of cruelty I have not been hampered by the definitions relating to cruelty which are to be found in the veritable legion of cases which preceded and have followed Russell v. Russell. There is now no need to consider whether conduct complained of caused 'danger to life, limb or health, bodily or mentally, or a reasonable apprehension of it, or any of the variations of that definition to be found in Russell. In choosing the words 'physical or mental cruelty of such kind as to render intolerable the continued cohabitation of the spouses' parliament gave its own fresh complete statutory definition of conduct which is a ground for divorce under Sec. 3(d) of the Act. Of course many of the principles laid down in the former cases will continue to be proper guides."

This case has become the leading case in Canada on cruelty under the Divorce Act 1968 for the proposition that Canadian judges are free to reshape the law on cruelty without being bound by the English law on cruelty symbolized by Russell v. Russell. Zalesky has been followed or approved of in almost every province in

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52 (1969) 1 D.L.R. 3rd 471.

Canada.[59]

Wright, J., to find an acceptable interpretation of the concept of cruelty under the new Divorce Act in Lacey v. Lacey,[54] held three cases over for simultaneous consideration of the concept of cruelty and suggested that courts should be guided by the following principles in interpreting Section 3(d) of the Divorce Act in cases in which cruelty was alleged.

> "In Canada the situation is now very different. Under the Divorce Act time has been set to work for those who feel that they have made a mistake in marriage, and

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Hunt v. Hunt, [1970] 73 W.W.R. 158 (B.C.).
Novak v. Novak, [1969] 68 W.W.R. 524 (B.C.).
Paskiewich v. Paskiewich, (1969) 2 D.L.R. 3rd 622 (B.C.).
B. v. B., (1970) 8 D.L.R. 3rd, 260 (B.C.).
Knight v. Knight, (1969) 68, W.W.R. 464 (B.C.).
Baker v. Baker (1969) 71 W.W.R. 241 (B.C.).
Galbraith v. Galbraith, (1969) 5 D.L.R. 3rd. 543 (Man.)
Ashraff v. Ashraff, (1970) 73 W.W.R. 321 (Man.).
Goudie v. Goudie, (1970) 9 D.L.R. 3rd. 90 (Newfoundland).
Vogt v. Vogt, (1970) 2 N.B.R. 2nd 87 (N.B.).
Coleman v. Coleman, (1970) 9 D.L.R. 3rd. 632 (N.B.).
Chouinard v. Chouinard, (1969) 2nd 941, (N.B.C.A.).
Bustin v. Bustin, (1969) 1 N.B.R. 2nd 496 (N.B.).
Maund v. Maund, (1969) 1 N.B.R. 2nd 547. (N.B.).
Hawthorne v. Hawthorne, (1969) 1 N.B.R. 2nd 803 (N.B.).
Van Zoost v. Van Zoost, (1969) 7 D.L.R. 3rd 373 (N.S.).
Bonin v. Bonin, (1969) 5 D.L.R. 3rd 533 (N.S.).
Herman v. Herman, (1969) 3 D.L.R. 3rd 552 (N.S.).
Dodge v. Dodge (1969) 1 N.S.R. 241.
Clarke v. Clarke, (1969) 2 O.R. 676, (Ont. S.C.).
Lacey v. Lacey, (1970) 1 O.R. (Ont.).
Resnick v. Resnick, (1970) 1 O.R. 524, (Ont. C.A.).
Knoll v. Knoll, [1970] 10 D.L.R. 199 (Ont.).
Mayberry v. Mayberry [1970] 11 D.L.R. 532.
Austin v. Austin, 1970, 73 W.W.R. 289 (Sask.).

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[1970] 1 O.R. 279.

the epithets of 'sinful' and 'cruel' need no longer attach to the unsuccessful respondent in a divorce action.

But there is, I believe, from my observation a new function attached to the courts with regard to the marriages brought before us under the Divorce Act. On behalf of the parens patriae and of society generally, we are asked to sort out in as just and merciful a way as possible the horrid confusion which in so many cases follows a broken marriage. Our work is judicial, of course, but in these matters it is also, in a special sense, remedial. In the discharge of these kinds of responsibilities in the modern world, the courts should not necessarily or readily accept the jurisprudence developed in other days and lands, for vastly different societies, to achieve other and indeed contrary ends.

I therefore choose to reject the argument that the Parliament of Canada in 1968 was attaching to the language it used in the Divorce Act of that year, the meanings and concepts which were first developed in English law where there was no divorce except by private Act of Parliament, and which have been recently widely applied to palliate the rigours and asperities of a divorce law based on defensive religious belief rather than imperative social need.

There is an apt argument at once available for such a choice. Parliament in s. 3(d) of the Divorce Act has not authorized a petition on the ground, as in England, that the respondent has treated the petitioner 'with cruelty' but has precisely defined the nature and type of 'cruelty', namely, physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses'.

I am of the opinion that this is not necessarily the 'cruelty' dealt with under the English Act of 1857, nor 'cruelty' relevant to desertion or alimony or judicial separation or other legal concepts.

Section 3(d) stands to be interpreted having regard to the exact words used, the remedial character of the whole Act, the other

provisions of the Act and the society in which we live and for which parliament legislated. The history and background and previous cases can be helpful and suggestive but need not be compelling or decisive.

Approached thus, the interpretation of s. 3(d) can be made by the use of the following rules or guidelines:

1. Each case must be determined on its own merits, subject to no general definition of curelty nor to the dictation of what was done in another case. Pearce, L.J., as he then was, put it clearly in Lauder v. Lauder, [1949] p. 277 at p. 308: 'For in a cruelty case the question is whether this conduct by this man to this woman, or vice versa, is cruelty.'

There is no way to anticipate and plumb beforehand the depths of human inhumanity and the inter-relation of particular spouses. The court has been given the task of relieving each suffering spouse from the intolerable pressure of matrimony where cruelty be found.

2. The only condition defined by the statute is that cruelty, either physical or mental, must render intolerable the continued cohabitation of the spouses. That is the fact that must be found to justify the exercise of jurisdiction. Whether or not the cruelty is such as to have caused injury to health or a reasonable apprehension of such injury is not, in my opinion, in issue. I do not consider Russell v. Russell [1897] A.C. 395, relevant. Its definition is not what the Canadian Parliament has laid down. Indeed, if I am free to do so in these fresh new winds of time, I find the four dissenting judges in the House of Lords in Russell v. Russell, and the pointed argument of Meredith, C.J.O., in Bagshaw v. Bagshaw [1920], 48 O.L.R. 52, 54 D.L.R. 634 (App. Div.), far more persuasive than the prevailing canon. The whole of the law relating to cruelty is judge-made law which I suggest Parliament has seen fit to alter, as it has altered the standing and nature of marriage in our society.

3. In almost every case, by the time it reaches the court, the parties must in fact be living separate and apart, for if they find life together tolerable, how can a court at the instance of one of them find it intolerable?

> 4. The acts complained of must be, in Lord Stowell's phrase, 'grave and weighty' and they must, to fit the statute, be insufferable, unendurable, more than flesh and blood can stand, beyond hearing. In such cases quick divorce should be available, but for the rest the parties can await the passage of time for their solution by divorce or for the balm of reconciliation. That is reasonable enough and is what the Act says in terms and shouts in sum and substance.
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> 5. The acts complained of must be more than those which merely illustrate the breakdown of marriage and the incompatibility of the parties. Such latter cases must await the passage of the years under s. 4(1)(e) of the Divorce Act. The cruelty ground must not be made a short cut to early divorce for the adolescent, the incompatible, the disappointed or the unhappy.
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> 6. By the same token the cruelty ground must not become a way of securing a quick divorce where the evidence of adultery, sodomy, bestiality, rape, homosexual acts or bigamy is imperfect. If those are the fields of cruelty alleged, they should in most cases be proven as grounds under the other paragraphs of s. 3. A like rule applies to imprisonment, drink or drug addiction and non-consummation under s. 4.
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> 7. The cruelty must be exercised by the respondent's activity against the petitioner and not arise from the nature of things, the human condition or the acts of third parties. I do not think that the cruelty found in Gollins v. Gollins [1964] p. 32 (Div. Ct. and C.A.); affirmed [1964] A.C. 664 (H.L.), and a large number of the English cases would be 'cruelty' in the terms of s. 3(d) of the Canadian Act of 1968.
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> 8. In general, the cruelty must be established by proven and corroborated facts and not be merely the subjective evidence and hurt feelings of the injured spouse.
>
> 9. In most cases there should be the element of fear, for it is this more often than the fact of the cruel act which renders cohabitation intolerable.

In every case it must be the judge's view of the particular facts which resolves the matter.

(b) Intention

It has always been clear that an intention to injure invests any act or conduct with a greater significance but it is wrong to exalt it into a criterion of legal principle which will decide in all cases whether conduct can be cruel.[55] In the light of proven injury to health, the court has to decide whether the conduct complained of was cruel in that it was sufficiently weighty to say that from a reasonable person's point of view, after a consideration of any excuse which the respondent might have in the circumstances, the conduct was such that the petitioner ought not to be called upon to endure it.[56] Any course of conduct intentionally pursued, provided it has some impact on the petitioner, may in appropriate circumstances justify a finding of cruelty. The presence of an intention to injure on the part of the respondent or proof that the conduct of the respondent was "aimed at" the petitioner is not an essential requisite of cruelty.[57]

(c) Insanity

Where the respondent is insane, this does not necessarily afford a defence to a charge of cruelty. In Williams v. Williams, Pearce, L.J. stated,[58]

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55 Payne: "Power on Divorce" (Burroughs) (1964 - 2nd ed.) at 480.

56 Diamond v. Diamond [1962] 38 W.W.R. 153.

57 Gollins v. Gollins [1963] 3 W.W.R. 176 at 208.

58 [1964] 3 W.L.R. 215.

> "Where the conduct would be held to be cruelty regardless of motive or intention to be cruel insanity would not bar defence."

It is possible to place the following interpretation on these words:

(1) Where the conduct is such that it is found to be cruel, whether or not the respondent intended to be cruel, then insanity is not a defence;

(2) Where the conduct is such that per se it cannot be found to be cruel, but the element of intention (the respondent intended to be cruel) makes a finding of cruelty possible, then insanity is a defence because the respondent lacks intention to be cruel.

(ii) Test

The concept of the reasonable man doesnot exist in the area of a finding of cruelty based on particular facts. In an English case, Pearce, L.J.[59] stated that the test was subjective.

> "....For in a cruelty case the question is whether this conduct by this man to this woman, or vice versa, is cruelty."

This dictum is followed in Canada under Section 3(d). It was quoted

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59 Lauder v. Lauder [1949] P. 277 at 308 (Eng.).

with approval in Lacey v. Lacey[60] and Ashraff v. Ashraff[61] (where Deniset, J. stated):

> "The respondent may have had little or even no intention to be cruel. But this will not alter a finding of treatment with physical or mental cruelty if such are the facts. The Divorce Act does not speak of 'guilt' but of 'treatment'. The intention of the respondent is not necessarily in issue..... A person may be cruel to another without even realizing it."

In Goudie v. Goudie[62] the Newfoundland Supreme Court stated:

> "..... I say subjective because it is clear that the decision we arrive at must be founded solely on a consideration of what effect the course of conduct of a particular man (or woman) has on the particular wife (or husband). Thus we have to have regard for the society in which they live, socially, morally, materially."

The phrase "cruelty of such kind as to render intolerable the continued cohabitation of the spouses", in Section 3(d) of the Canadian Divorce Act constitutes the novel part of the Canadian concept of cruelty as a ground for divorce. This introduces a futuristic element. The past cruelty should be such that the courts ought to give future protection against continuation of such conduct to the unfortunate

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60 [1970] 1 Ont. R. 279 (Ont.).

61 [1970] 73 W.W.R. 321 at 324 (Man.).

62 [1970] 9 D.L.R. 3rd 90 (Nfld.); see also Hawthorne v. Hawthorne [1969] 1 N.B.R. 803 (N.B.).
F v. F [1970] 74 W.W.R. 241 (B.C. S.C.).
L v. L [1970] L.S. 222 (Que.).

petitioner. The need for future protection must be shown through the nature and quality of past matrimonial misconduct. As regards what constitutes sufficient proof the Canadian courts have indicated that the past conduct must be "grave and weighty" and not frivolous or merely such as shows incompatibility of temperament.

In Goudie v. Goudie[63] the Newfoundland Supreme Court stated:

> "The Act.....creates a new concept, the significant test being the intolerability of future life together as man and wife.... This is not to say that such a large interpretation is to be put on the section as to arrive at the result that just as soon as one spouse finds his or her married life intolerable, they can bring it to an end. The position is that intolerability must derive from the conduct of the other party. Now this conduct may be active or passive, it can consist of deliberate and carefully conceived ill treatment by word or deed, or it can equally arise from thoughtless neglect. It can in short be found in acts of omission equally with acts of commission. But there has to be something in the conduct of a respondent upon which to sustain the claim of future intolerable cohabitation.....If this be so then it is obvious that the evidence should be clear and adequate; no easy assumption should be permitted to enter into it. The court has to be satisfied that the conduct if reasonably considered leads to the conclusion that continued life together as man and wife will become intolerable for the petitioner."

The Canadian courts have held that the following facts were sufficient to constitute cruelty. This list is taken from the annotation of the Divorce Act prepared by Judge Reville for a conference of Ontario judges during 1970:

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63 [1970] 9 D.L.R. 3rd 90 (Nfld.).

"1. Assault by husband: Herman v. Herman [1969] 3 D.L.R. (3d) 471 - decree granted.

2. Heavy drinking and foul language by husband: Delaney v. Delaney [1969] 1 D.L.R. (3d) 304 - (Husband drunk on wedding day and seldom sober thereafter') - decree granted.

3. Heavy drinking and minor assault by husband: Knoll v. Knoll [1969] 6 D.L.R. (3rd) 304 - decree refused, but upset on appeal to Ontario C.A. See [1970] 10 D.L.R. 199 (Ont.).

4. Assault - heavy drinking - threats of leaving wife by husband - wife a paranoid personality: Bonin v. Bonin [1969] 5 D.L.R. (3d) 533 - held to be cruelty but decree refused on ground of condonation.

5. Husband killing both children of the marriage and then attempting suicide: N v. N [1969] 4 D.L.R. (3d) 639 - decree granted.

6. Practice of coitus interruptus by husband: Clark v. Clark [1969] 2 O.R. 676 (S.C.) - decree granted.

7. Transvestitism by husband (Sexual perversion impelling an individual to wear the clothes of the opposite sex): (a) Coleman v. Coleman [1969] 3 D.L.R. (3d) 268
(b) C v. C [1969] 2 O.R. 786 - decree granted.

8 Suspected homosexuality; husband leaving wife to live with male friend: Countway v. Countway [1968] 70 D.L.R. (2d) 73

9. Wife leaving husband and four children; husband reacts by drinking heavily but rehabilitates himself. Unnecessary for husband to establish that wife intended to injure him. White v. White [1968] 69 D.L.R. (2d) 60 (N.S. Ct. for Dom. C.) - decree granted.

10. Violent assault by husband; denoting excessive suffering, severity of pain and mercilessness, and not mere displeasure, irritation, anger or dissatisfaction. Chouinard v. Chouinard [1968] 1 N.B.R. (2d) 941 (C.A.) affirming 1 N.B.R. (2d) 582 - decree granted.

11. Paedophilia (Lustful attraction to children): fear of consequences affecting petitioner's health - future cohabitation rendered intolerable. H. v. H. (N.S. H.C.J.) Dubinsky, J. [1970] 9 D.L.R. 722 - decree granted.

English cases which may be relevant:

12. Unnatural and perverted practices by wife with another woman: Spicer v. Spicer [1954] 3 All E.R. 208.

13. Refusal of sexual intercourse: Sheldon v. Sheldon [1966] 2 All E.R. 257, but not when inability to copulate due to bodily infirmity: P v. P [196] 3 All E.R. 919, and B v. B [1965] 3 All E.R. 263; and see: [1969] 2 Alta. L. Rev. 239.

14. Communication of a venereal disease to wife by husband knowingly, wilfully or recklessly - Browning v. Browning [1911] P. 161.

15. Constant and unflagging nagging by wife of husband: Squire v. Squire [1949] P. 51 at 72.

16. Persistently living on wife's income; husband pawning his own and her property; buying things on her credit and pawning same - Bertram v. Bertram [1944] P. 59.

17. Refusal by wife to have a child affecting her husband's health: P(D) v. P(J) [1965] 1 W.L.R. 963.

18. False charges of adultery against wife by husband: Jeager v. Jeager [1903] 19 T.L.R. 451.

19. False charges of unnatural offences: Gale v. Gale [1852] 2 Rob. Eccl. 421; unless such false accusations due to delusions; if the delusions are such that accused not aware of doing wrong: Elphinstone v. Elphinstone [1962] P. 203.

20. Deliberate denial of necessary medical treatments when they can be easily afforded, if this endangers or affects health: Dysart v. Dysart [1847] 1 Rob. Eccl. 106, 470.

21. Cruelty to a child in the presence of the other spouse: Wright v. Wright [1960] P. 85.

22. Wilful failure and refusal to support wife and children resulting in permanent impairment of wife's health which a reasonable man must have known would be the effect of this conduct: Gollins v. Gollins [1963] 2 All E.R. 966.

23. Persistent association of a spouse with a member of the opposite sex, even though sexual impropriety cannot be proved: Windeatt v. Windeatt (No. 2) [1963] P. 25.

24. Persistent course of conduct of deliberately inducing in the mind of one's spouse a reasonable belief in one's adultery, resulting in injury to spouse's health: Walker v. Walker [1962] P. 42.

25. Conviction of husband for crime, which affects wife's health, may constitute cruelty: Woolard v. Woolard [1955] P. 85.

26. Wife's violence and abuse of husband driving him from chapel and from his parents' home causing him to have a fit: Pritchard v. Pritchard [1864] 3 Sw. & Tr. 523."

In the following cases the Canadian courts held cruelty was not sufficiently proved from the facts:

"1. Trivial grievances based on "shaking up", "argument", "husband's dictatorial manner": Zalesky v. Zalesky [1969] 1 D.L.R. (3d) 471.

2. Habitual drunkenness of wife, unaffected and unrelieved by psychiatric treatment, hospitalization and membership in A.A. Husband deprived of companionship, intercourse and other wifely services. Held not to be cruelty sufficient to justify a divorce under Section 3(d) but sufficient to justify a divorce under Sec. 4(1)(b), and therefore decree granted: Knight v. Knight [1969] 68 W.W.R. 464. (B.C.S.C.).

3. Taciturnity and callousness (refusal of husband to speak to wife for extended periods of time);("Coventry"); not cruelty: Saunders v. Saunders [1965] p. 499.

4. Filthy personal habits and refusal to do housework on part of wife not cruelty when not directed at the husband: Sangster v. Sangster [1954] S.A.S.R. 117.

5. Isolated assault - one blow struck by husband after argument and after 12 years of marriage: Cuthbert v. Cuthbert [1968] 2 O.R. 503 (C.A.). Alimony refused on ground husband's conduct not of such a grave and weighty nature as to make the continuation of the marriage intolerable.

6. Conduct of a mentally healthy respondent which is normal by all accepted standards cannot be construed as cruelty just because it is misconstrued as cruelty by a petitioner suffering from mental illness.
Baker v. Baker [1969] 71 W.W.R. 241.
B v. B [1970] 8 D.L.R. (3d) 260 (B.C.S.C., L.J.) [1970].

In India, cruelty is not a ground for divorce but is a ground for judicial separation.[65] The general meaning and concept of cruelty is the same as already discussed but in addition the court keeps in mind the social climate, standard of behaviour, comfort and general environment of Hindu spouse in addition to the considerations of caste and custom. These concepts generally develop and new rules for maintaining the dignity of women in the new social set-up emerge, especially when there is advancement in the standard of living.[66]

(iii) Suggested Reforms

It may be suggested for India that since cruelty is so abhorrent in the matrimonial relationship that it has been made a ground for

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65 Hindu Marriage Act 1955, Section 10(b).

66 Kamala Devi v. Amarnati [1964] A.I.R. J.K. 33.

dissolution of marriage in most civilized countries, including Canada, England, Australia, United States, it should be made a ground for divorce in India also, instead of it being a ground for judicial separation. It may further be suggested that it would be preferable not to have a detailed definition while making cruelty as a ground for divorce, but to allow the concept of cruelty to remain open to adjustment as it is desirable to move through the medium of judicial decision. Its administration should be left to the learning, good sense, responsibility and wisdom of Indian judges, guided as they are by the jurisprudence of their own courts and those of England.

In the end, it is submitted that the concept of cruelty will become wider with the passage of time and the impact of new ideas based on a strictly rational outlook of life, and for this reason, cruelty will always be an uncertain part of the law of divorce.[67]

It might be concluded in the words of Sir Carleton Allen:[68]

> "I should be sorry to give the impression that cruelly ill-treated spouses should not be protected by the law or that marriages which have degenerated into mere implacable warfare - and there is no hatred like that which can develop between hostile husbands and wives - should be kept in existence; but I believe that the offence of 'cruelty' tends today to be extended beyond its due bounds, and indeed to be abused by some practitioners and their clients, in favor of persons who have not brought to marriage, or have not even tried to understand, what matrimony requires in humanity, sympathy and obligation, if it is

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67 Khetarpal: "Modern Concept of Cruelty", supra note 45.

68 Aspects of Justice, (London - 1958) at pp. 235-6.

> to remain a fundamental institution of society."

[E] PERMANENT BREAKDOWN OF THE MARRIAGE

The Canadian Divorce Act, Section 4(1) reads:

> "4(1).....a petition for divorce may be presented to a court by a husband or wife where the husband and wife are living separate and apart on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances.....
>
> (a) the respondent's imprisonment;
>
> (b) the respondent's gross addiction to alcohol or narcotics;
>
> (c) the respondent's disappearance for 3 years;
>
> (d) the respondent's inability or refusal to consummate the marriage;
>
> (e) the spouses having lived separate and apart for a period of 3 years.

The opening part of subsection (1) of section 4 makes the permanent breakdown of a marriage a ground for divorce if the breakdown is attributable to one or more of certain prescribed circumstances set out in paragraphs (a) to (3) of subsection (1) and if the parties are "living separate and apart" at the time that the petition is presented, although only under subsection (e) must the spouses have been "living separate and apart" for a minimum period of time. Proof of one of the requirements only, that is, the breakdown of the marriage or the "living separate and apart" will not justify the granting of a decree.[69] The concept of

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69 Beaudet v. Beaudet [1969] 1 N.B. 2nd 461.

breakdown implies that there is a possibility of repairing the damage through reconciliation. The position of the court is altered. It is not merely necessary to determine that the facts are sufficient to prove breakdown, but also that reconciliation is not possible. The circumstances listed in paragraphs (a) to (d) range from the relatively objective circumstances of the respondent's imprisonment or disappearance for a specific period of time,[70] or the respondent's incapacity or refusal to consummate the marriage, to the relatively subjective circumstance of the respondent's gross addiction to alcohol or a narcotic.[71]

(i) Gross Addiction to Alcohol or Narcotics

Under Section 4(1)(b) the parties must have been living separate and apart on the date of presenting the petition. The cause underlying this fact is the respondent's addiction to alcohol or narcotics. The addiction must be such that there is no hope of a possible reconciliation of the spouses: viz., there should not be a reasonable possibility that in the foreseeable future the respondent could be cured. If such a possibility exists then the marriage cannot be considered to have permanently broken down.

The facts which constitute satisfactory evidence of gross addiction vary in each case. The exact extent of proof is uncertain but it appears from decided cases that the burden of proof is a heavy one.

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70 3 years.

71 Hughes: "Family Law" [1971] 5, Ottawa Law R., 176 at 181.

In Delaney v. Delaney[72] the British Columbia Supreme Court stated that merely the fact that the respondent drank frequently was not in itself sufficient to justify the court in finding 'gross addiction' to alcohol. The criterion for deciding whether the respondent is 'grossly addicted' is not necessarily the extent to which the respondent drinks (or takes narcotics). In Knoll v. Knoll[73] the Ontario Supreme Court indicated that in order to determine whether the ground of marriage breakdown exists through this cause the court must look to the effect of the respondent's conduct on the petitioner having due regard to her own particular temperament, sensibilities and state of health. The issue is the condition which the respondent's gross addiction produces and not necessarily or solely the extent to which the respondent imbibes alcohol or narcotics.

(ii) Living Separate and Apart 4(1)(e)(i)

The phrase 'living separate and apart' is not defined in the Divorce Act and there is at present judicial disagreement over its interpretation. The viewpoint of the minority is that:

> "There is no reason to give the words 'living separate and apart' any meaning other than the literal one. By themselves they describe a physical state of affairs and not a state of mind. I see no reason to qualify them by requiring proof of intent as well as proof of the physical act."[74]

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72 [1969] 1 D.L.R. 303 (B.C.S.C.).

73 [1970] D.L.R. 199 (Ont.).

74 Kallwies v. Kallwies [1970] 12 D.L.R. 3rd 206.

However, the weight of judicial opinion is that the phrase presupposes a total destruction of the matrimonial consortium and this, in turn, has been held to require that the petitioner prove by a preponderance of evidence or upon the balance of probabilities, both an animus separandi and a factum of separation.[75] The court in Rushton v. Rushton[76] stated:

> "The words 'separate and apart are disjunctive. They mean.....that there must be a withdrawal from the matrimonial obligation with the intent of destroying the matrimonial consortium, as well as physical separation. The two conditions must be met."

The majority viewpoint, it is submitted, is supported by section 9(3)(a) which clearly implies that an intention to live separate and apart must be present at the beginning of the period of separation.[77]

The fact that both spouses reside under the same roof does not preclude a finding of living apart under 4(i)(e). The British Columbia Supreme Court in Rushton v. Rushton[78] held that a husband and wife living under the same roof may yet live separate and apart within the meaning of

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75 Herman v. Herman [1969] 3 D.L.R. 3rd 551.

76 [1968] 66 W.W.R. 764.

77 The Divorce Act, Can. Rev. Stat. C. D-8, Sec. 9(3)(a) [1970]
(3) For the purposes of paragraph 4(i)(e), a period during which a husband and wife have been living separate and apart shall not be considered to have been interrupted or terminated
(a) by reason only that either spouse has become incapable of forming or having an intention to continue to live so separate and apart or of continuing to live so separate and apart of his or her own volition, if it appears to the court that the separation would probably have continued if such spouse had not become so incapable.....

78 [1968] 66 W.W.R. 764.

those words where in fact two households have been created, however cramped the actual living space may have been. There can be a physical separation within the one suite of rooms. Although courts are prepared to find that spouses are living apart under the same roof, there is a caveat on this. The evidence needs to be carefully considered and consideration is required of evidence of both animus and factum. For example, as in Pybus v. Pybus[79] where the facts show that the wife continued to cook, launder and perform the duties of maintaining a joint home with the husband, the court will decline to find that spouses have lived apart under the same roof since the evidence does not show that there have been two households under the same roof.

The fact that spouses have ceased to have matrimonial intercourse may be treated as evidence that they are living apart as in Seminuk v. Seminuk,[80] but it is not in itself, with no other factual evidence, sufficient to prove breakdown of marriage, nor does it conclusively show that spouses are living separate and apart. Hence in Reid v. Reid[81] the petition was dismissed for lack of evidence proving breakdown where the spouses had ceased to have intercourse but the wife continued to do the husband's laundry and provide him with breakfast.

Conversely, separate residences, even for long periods of time, do not preclude a finding that the spouses are not living separate and apart if the parties consider it only a temporary separation. The main factor

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79 [1970] 2 W.W.R. 315.

80 [1969] 68 W.W.R. 249 - rev'd [1970] 72 W.W.R.

81 [1969] 71 W.W.R. 375 (B.C. S.C.).

is the intention of the parties to continue the matrimonial relationship.[82]

There are two views whether an intention to terminate matrimonial consortium is necessary before finding that the spouses have lived separate and apart can be made. In Kallwies v. Kallwies[83] the Manitoba Queen's Bench stated that the intention was not a requirement, and was irrelevant under section 4(1)(e)(i). The section is applicable if the physical separation is due to circumstances beyond the control of the spouses. On the other hand in Lachman v. Lachman[84] the court stated that marriage breakdown may be evidenced by the intention of both spouses to terminate conjugal consortium; the intention of only one spouse is insufficient. In Rowland v. Rowland[85] the Ontario S.C. stated that the words 'separate and apart' must mean not only that the spouses are living physically apart but that there must be an attitude of mind present which rejects or dismays the matrimonial consortium and that to succeed under Section 4(1)(e)(i) there must be a consensus between the spouses that the matrimonial consortium is destroyed. There must be an animus separandi.

These two requirements of animus separandi and the fact of living apart are somewhat similar to the requirements under the matrimonial fault of desertion, of an animus deserandi and the physical fact of

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82 Lachman v. Lachman [1970] 12 D.L.R. 3rd 221; but see Foote v. Foote [1971] 1 Ont. 338, where one isolated act of intercourse between the parties during the three years meant that separation had not been in full force for the required period.

83 [1970] 74 W.W.R. 158 (Man. Q.B.).

84 Supra note 82.

85 [1969] 2 O.R. (Ont. S.C.).

desertion. In separation under 4(1)(e)(i) the spouses intend to live apart and further may agree to live apart.[86] In desertion, spouses cannot agree to live apart. This factor causes problems in situations where the fact that the spouses are living apart is caused by circumstances beyond the control of either spouse, e.g. a situation where one spouse is mentally ill. But as pointed out the Manitoba Q.B. in Kallwies v. Kallwies[87] stated that intention was not a requirement and was irrelevant under section 4(1)(e). Justice Bastin held:[88]

> ".....To hold that in a situation where one spouse is hopelessly insane or suffering from incurable incapacity there must be a finding of desertion on the part of the other spouse is to introduce the concept of matrimonial offence where it was never intended."

(iii) Desertion and 4(1)(e)(ii)

In order to discuss 4(1)(e)(ii) of the Divorce Act of Canada, it is necessary to first discuss what is desertion.

Desertion is a ground for judicial separation in Canada[89] and as well under the Hindu Marriage Act 1955.[90] It has not been defined in any of the statutes. Desertion consists of the unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the

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86 Swinemar v. Swinemar, (1970) 9 D.L.R. 201.

87 Supra note 83.

88 Ibid. at 109.

89 Domestic Relations Act, R.S.A. 1970, Chap. 113, Sec. 7(c).

90 Section 10(a).

intention of remaining separated permanently. It therefore follows that four elements must be present before desertion can be proved:[91]

(a) The de facto separation of the spouses;

(b) The animus deserendi - i.e. the intention on the part of the spouses in desertion to remain separated permanently;

(c) The absence of consent on the part of the deserting spouse;

(d) The absence of any reasonable cause for withdrawing from cohabitation on the part of the deserting spouse.

It must not be thought that it is the party who takes the physical step of leaving the matrimonial home or otherwise withdrawing from cohabitation who is necessarily the deserting spouse. In cases of simple desertion this is so, but where one spouse virtually drives the other from the home or behaves in such a way that the latter can no longer reasonably be expected to live with him or her, then it may be the spouse remaining in the matrimonial home and not the spouse who departs from it who is in desertion. Such a case is known as constructive desertion.

(a) Separation De facto

To constitute desertion, the spouses must be separated in fact. It is not sufficient for the purpose that one of the spouses has abandoned

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91 Pardy v. Pardy [1939] 3 All E.R. 779.

some of the obligations of matrimony or refused to perform isolated duties (e.g. refused to have sexual intercourse);[92] there must be a rejection of all the obligations of marriage,[93] in other words, there must be a complete cessation of cohabitation.

This state of affairs, of course, is normally brought about by one spouse's leaving the matrimonial home, so that they are no longer living under the same roof. In such a case, there is a clearly sufficient separation. But a situation may arise where the spouse though continuing to live together do not fulfill the matrimonial obligation. In the words of Lord Merrivale:

> "Desertion is not the withdrawal from a place, but from a state of things".

Hence, if there has been a total cessation of cohabitation, there can be desertion just as effectively as if the husband and wife were living in two separate houses. The correct test to be applied in such a case is whether there are two households or one.[95]

(b) Animus Deserendi

A de facto separation in itself will not constitute desertion unless the guilty spouse has the intention of remaining permanently separated from the other. Clearly there will be no question of desertion if one

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92 Weatherley v. Weatherley [1947] 1 All E.R. 563.

93 Perry v. Perry [1952] 1 All E.R. 1076.

94 Pulford v. Pulford [1923] p. 18, 21.

95 Hopes v. Hopes [1948] 2 All E.R. 920.

spouse is temporarily absent on holiday or for reasons of business or health.[96] Normally the animus deserendi will be present when one spouse leaves the other, so that the desertion will continue immediately, there is a de facto separation. But if when the original separation took place, the parties intended to return to each other, and one of them later resolves not to return, desertion begins as soon as the animus is formed.[97]

(c) Constructive Desertion

Where the conduct of one spouse is such that the other spouse is compelled to withdraw from cohabitation the former spouse is the deserter and the case is called one of constructive desertion.[98] The same elements must be proved in a charge of constructive desertion as are required to establish simple desertion and the only practical difference between the two cases lies in the circumstances which contribute the factum of desertion.[99] In simple desertion the petitioner must prove that the respondent left without cause and with the intention of remaining permanently separated. In constructive desertion he must prove that the

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96 Lilley v. Lilley [1959] 3 All E.R. 283.

97 Supra note 94 at 24; Shaw v. Shaw [1939] 2 All E.R. 381.

98 Kemp v. Kemp [1961] 1 W.L.R. 1030; If one spouse discovers that the other has committed adultery or has reasonable grounds, induced by the other's conduct, for believing that adultery has been committed, the innocent spouse may be justified in leaving the matrimonial home and subsequently in alleging constructive desertion.

99 Buchler v. Buchler [1947] 1 All E.R. 319.

respondent was guilty of conduct which justified him in leaving and that the respondent intended thereby to bring cohabitation permanently to an end. In each case, of course, the separation must also have been against the petitioner's will in the sense indicated.[100]

The mere wish or intention to expel unaccompanied by acts equivalent to expulsion is insufficient to constitute constructive desertion, and an indication by a husband to his wife that she may leave him if she likes is not enough unless the conduct of the husband is such as to amount to an expulsion in fact.[101] It is not necessary that the conduct complained of amount to a matrimonial offence such as cruelty or adultery but it must exceed in gravity such behavior as every spouse bargains to endure when accepting the other "for better, for worse".[102] The ordinary wear and tear of conjugal life does not of itself suffice.[103]

In order to establish a case of constructive desertion, it is necessary to prove either an actual intention to bring about a rupture of the matrimonial relation, or an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about

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100 Bromley: "Family Law" (Butterworth) (1962 - 2nd ed.) at 111.

101 Supra note 99.

102 Ibid.

103 Edwards v. Edwards [1950] P. 8; [1949] 2 All E.R. 145.

such a rupture.[104] Where conduct of the required grave and weighty character is established, the animus deserendi is readily inferred since a person is presumed to intend the natural and probable consequences of his acts. Where the conduct complained of is such that a reasonable man would know that in all probability it would result in the withdrawal of the other spouse from the matrimonial relationship, that is sufficient proof of an intention to disrupt the matrimonial consortium.[105]

Under the Divorce Act of Canada, Subsection 4(1)(e)(ii), desertion is not treated as a matrimonial fault which can be used as a ground for divorce by the innocent spouse. It is treated as evidence of marriage breakdown under which, if the wrongdoing spouse can show that for the past five years he has continuously committed this fault he could obtain a divorce which would dispense him from any obligation to live with the "innocent spouse".

The concept of 'desertion' has been used in the following statutes in India:

(a) The Special Marriage Act, 1954

(b) The Hindu Marriage Act, 1955

(c) The Parsi Marriage and Divorce Act, 1938

(d) The (Christian) Divorce Act, 1872.

The Special Marriage Act 1954 provides for divorce in accordance with two philosophies. Grounds for divorce according to traditional fault

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104 Lang v. Lang [1954] 3 W.L.R. 762.

105 Ibid.

theory and secondly regarding the marriage as a social phenomenon, and treats it as a matter of fact, where two persons of their own free accord agree to live together as husband and wife. Pursuing this sociological philosophy the statute provides as a concomitant that two such persons are equally free of their own accord to decide not to live together as husband and wife. A petition for divorce may be presented by both parties together on the ground that they have lived separately for a minimum of one year, that they have been unable to live together and have mutually agreed to dissolve their marriage.[105A]

In the entire British Commonwealth in all countries where the common law jurisprudence is followed, there is no other statute which displays such a liberal attitude toward divorce as does this statute.

It should be observed that the Hindu Marriage Act 1955 does not provide the relief of divorce for the matrimonial fault of desertion. The Parsi Marriage and Divorce Act also treats desertion in the traditional manner as a matrimonial fault. Thus it is interesting to observe that as a matter of philosophy the draftsmen of the Indian statutes have conformed to the traditional English common-law jurisprudential notions and have treated the concept of desertion as a matrimonial fault. The use of the concept of desertion in the Canadian Divorce Act is radically different from that in other common law jurisdictions. In Canada, under 4(1)(e)(i) a petitioner may seek divorce on the ground of breakdown of marriage, evidenced by the fact that spouses have lived separate and apart for three years. The cause

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105A The Special Marriage Act 1954, Section 28.

of this breakdown may be any cause other than the matrimonial fault of desertion. If, however, the cause of breakdown is desertion, the respondent in Canada may raise this as a defence to 'punish' the petitioner by obliging him to wait for five years and bring the petition under 4(i)(e)(ii). The common law concept of desertion is used in the Canadian Divorce Act only as a defence to a petition brought under 4(1)(e)(i). When the erring petitioner does bring his petition after waiting for five years under 4(1)(e)(ii) the concept of desertion is redundant. It is not necessary for the petitioner to prove that he has committed the matrimonial fault of desertion in order to succeed under 4(1)(e)(ii). The ground under this subsection is merely breakdown of marriage evidenced by the fact of five years of living separate and apart.

(iv) Suggested Reform

It is submitted that the intention of Parliament can be better effected by improving the draftsmanship of this subsection. This may be done as follows:

(1) Add another fault section to section 3 giving the innocent petitioner the right to seek divorce based on the respondent's desertion: this is the normal use of the concept.

(2) Rephrase Sec. 4(1)(e) to provide:

(a) Where the ground for divorce is breakdown, this may be evidenced by the fact that the spouses have lived separate and apart for three years.

(This is a no fault section).

(b) Where the ground for divorce is breakdown, this may be evidenced by the fact that spouses have lived separate and apart for five years and the deserter may petition on this ground.

By this method, the innocent spouse in a desertion situation would be afforded an opportunity to seek divorce earlier under the fault section.

It is further submitted that the existing law of divorce in Canada should be reframed on the basis of the new principle which is already adopted by England, i.e. "doctrine of breakdown of marriage". The existing grounds of divorce should be abolished and their place taken by single, comprehensive ground which would allow divorce to be granted if it could be proved that the marriage had irretrievably broken down. The reason for this is that the matrimonial offences on which divorce is founded under the present law are not usually the real causes of the breakdown of a marriage but merely its symptoms. People deliberately commit offences or pretend to commit them in order to supply grounds for divorce. The following statistics of 1969 will show that the number of Petitions filed immediately after the Divorce Act under marriage breakdown are far more than the grounds mentioned under the matrimonial fault:[105B]

105B Ruth R. Deech: "Comparative Approaches to Divorce" (1972) 2 Mod. L. R. 113 at 127.

	Single Ground
Adultery	9,221
Sodomy	2
Bestiality	1
Rape	4
Homosexuality	26
Bigamy	18
Physical cruelty	258
Mental cruelty	567
Imprisonment	43
Addiction to alcohol	160
Addiction to narcotics	4
Whereabouts of spouse uknown	116
Non-consummation	123
Three years' separation	13,582
Five years' separation	1,591

It is suggested that the solution is to require the court to determine in each case whether the marriage has broken down beyond hope of reconciliation. As the Pastoral Institute of the United Church of Canada has said:[106]

> "Marriage breakdown is a basis for divorce that adopts the policy that a marriage which has irretrievably broken down in fact should be dissolved in law. Conversely a marriage should not be dissolved in law until it is clearly demonstrated that in fact it has irretrievably broken down."

It is further submitted for India, that the presently existing system of trial in divorce cases on the ground of alleged matrimonial fault be retained and there be added an inquisitional procedure of trial on the ground that for some or any reason the marriage has broken down. This introduction of the concept of marriage breakdown will not

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106 Proceedings of the Special Joint Committee of the Senate and House of Commons on Divorce, No. 8, November 22, 1966, pp. 411-12.

only help the people whose spouses though not fulfilling the matrimonial obligations are unable to get a divorce because of the lack of evidence to prove the requisite ground or fault, but will also put the Indian law of divorce on the same footing as any other divorce laws of big nations.

CHAPTER VII

BARS TO A PETITION OF DIVORCE

[A] GENERAL

Although the Court may have jurisdiction and grounds of divorce can be proved to exist, it does not always follow that a divorce will be granted, since the conduct of the spouse seeking relief may, in certain circumstances, act as a bar to relief. Where the matrimonial offence has been condoned or connived by the spouse seeking relief or where there has been collusion between the parties, or there has been an unreasonable delay in instituting the proceedings, the Court has, in certain circumstances, a discretion to grant or refuse a decree. It may be pointed out that these bars are also appropriate to actions for judicial separation.[1]

Under the Divorce Act (Canada), 1968 the Court in Canada will not grant a relief and will;

(1) dismiss the petition for collusion, where the petitioner is a party either directly or indirectly to an agreement or conspiracy entered into for the purpose of subverting the administration of justice: ss. 2(c), 9(1)(b).

(2) If any Section 3 ground is relied upon,

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[1] See Judicial Separation under Chapter Eight.

dismiss the petition where the petitioner has condoned that ground unless the public interest would be better served by the Court granting the decree: 2(d), 9(1)(c).

(3) If any Section 3 ground is relied upon, dismiss the petition where the petitioner has connived at that ground unless the public interest would be better served by the Court granting the decree: s. 9(1)(c).

(4) If marriage breakdown by reason of any of the circumstances in Section 4(1) is relied upon, refuse the decree where there is a reasonable expectation that cohabitation will occur or be resumed: s. 9(1)(d).

(5) If marriage breakdown by reason of any of the circumstances in Section 4(1) is relied upon, refuse the decree where a divorce would prejudice the making of maintenance arrangements for the children of their marriage: s. 9(1)(e).

(6) If the marriage breakdown - separation grounds is relied upon, refuse the decree

where a divorce would be unduly harsh or unjust to either spouse: s. 9(1)(f).

(7) If either branch of the marriage breakdown - separation ground is relied upon, refuse the decree where a divorce would prejudice the making of maintenance arrangements for either spouse: s. 9(1)(f).

It is to be noted from the above, that collusion is an absolute bar to relief, and applies whether the proceeding is supported by a matrimonial offense or marriage breakdown. Condonation and connivance are discretionary bars limited in their application to matrimonial offense proceedings. In cases where the bars of collusion, connivance or condonation apply, the petition is dismissed. These bars distinguish themselves from the other circumstances in terms of their object, which is to protect the institution of marriage and the public interest.

In India the provisions of the Hindu Marriage Act[2] adopt a well established principal of matrimonial law that the decree of dissolution of marriage is to be made only upon strict proof. The Court in India will not grant a relief to the petitioner if any of the absolute bars apply to the facts of the case i.e.; -

(1) The petition must be dismissed if the

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2 The Hindu Marriage Act 1955, Section 23.

Court is satisfied that the petitioner has not, in any manner, been accessory to or connived at or condoned the act or acts of adultery where the petition is on that ground, or has not in any manner condoned the cruelty where the petition is on that ground: s. 23(b).

(2) The petition must be dismissed if the Court is not satisfied that there is no collusion between the parties: s. 23(c).

(3) The petition must be dismissed if the Court is not satisfied that there has not been any unnecessary or improper delay in instituting the proceedings: s. 23(d).

(4) The petition must be dismissed if the Court is satisfied that the petitioner, though able to establish the ground for granting relief, is in any way, taking advantage of his or her own wrong or disability for the purpose of such relief: s. 23(a).

(5) The petition must be dismissed if there

is any legal ground for not granting the relief: s. 23(3).

[B] CONDONATION

(i) Absolute Bar and the Doctrine of Revival

To amount to condonation there must be forgiveness coupled with the reinstatement of the offending spouse to her matrimonial position. Inevitably, for condonation to operate the petitioner must be in possession of a complete disclosure of facts. The facts must not be distorted or misrepresented. Thus, the petitioner can only condone an act or offence of which he has knowledge and not something about which he is in the dark. The mental element is important and the petitioner must also understand what is told. The petitioner's knowledge is a question of fact; mere belief or suspicion is insufficient. But if the wronged spouse is in doubt as to the other's guilt, reinstatement will nevertheless be complete if he says in effect, "whether guilty or not, I will take you back and you shall be restored to my bed".[3] He is said to have waived his right to complain. In Fearn v. Fearn[4] it was held that mere words of forgiveness did not constitute

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3 Keats v. Keats (1885) 164 E.R. 754.
See also the following Indian Cases where the English law was followed:-
Rajani v. Prabhaker (1957) 59 Bom. L.R. 1169.
Chandrabhagabai v. Rajaram (1955) 57 Bom. L.R. 946.
Premchand v. Bai Galal (1927) 29 Bom. L.R. 1336.

4 (1948) 1 All E.R. 459.

condonation and that, as the husband had done nothing to reinstate the respondent as his wife, there was still no bar to his pleading.

The most common form of reinstatement is to resume co-habitation. One exception to the requirements of forgiveness and reinstatement in condonation is an act of sexual intercourse itself after the petitioner has knowledge of his wife's offence.[5] Condonation is conditional on future good conduct. The condoned offence is not blotted out, but remains suspended like a sword of Damocles over the offender's head; any future misconduct, whether of the same kind or different, and whether serious enough to amount to a matrimonial offence or not, will wipe out the condonation and revive the original cause of complaint.

It is a sort or probation.[6] Like all probation it will not last forever and as the time passes after the original offense has been forgiven, it becomes progressively more difficult to revive, so that in the end it is blotted out altogether for all practical purposes.[7]

Such is also the position of condonation in India. It is an absolute bar since the language of the Act suggests it.[8]

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5 Henderson v. Henderson (1944) 1 All E.R. 44.

6 The Family and the Law - Margaret Puxon - p. 108.

7 Cundy v. Cundy (1956) 1 All E.R. 245.

8 The Hindu Marriage Act (1955) Section 23; "..... then, and in such a case, but not otherwise, the Court shall decree such relief accordingly...."; see also, The Special Marriage Act (1954) Section 34, where identical words are used.

(ii) Discretionary Bar

Condonation in Canada under the Divorce Act (Canada) 1968, has been made as a discretionary bar. Section 9(1)(c) states:-

> "9(1) On a petition for divorce it shall be the duty of the Court
>
> (c) Where a decree is sought under Section 3, to satisfy itself that there has been no condonation or connivance on the part of the petitioner, and to dismiss the petition if the petitioner has condoned or connived at the act or conduct complained of unless in the opinion of the Court, the public interest would be better served by granting the decree.

Section 2(d) of the Divorce Act (Canada) 1968, partly defines condonation. It reads:-

> "2. In this Act
>
> (d) condonation does not include the continuation or resumption of cohabitation during any single period of not more than ninety days, where such cohabitation is continued or resumed with reconciliation as its primary purpose."

It is to be noted that the above provision does not state what facts would constitute condonation. It simply states what facts are excluded from being condonation under the Divorce Act (Canada) 1968, which at common law would be considered as condonation.

The major fact from which condonation may be inferred is reconciliation. Reconciliation may be inferred from cohabitation of spouses but section 2(d)[9] provides a caveat that any period up to

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9 Blackburn v. Blackburn (1970) 11 D.L.R. 127 (Ont.).

ninety days should not be considered reconciliation for the purpose of barring the petition through the bar of condonation. The isolated acts of intercourse whilst the parties live apart cannot amount to cohabitation nor can condonation be inferred from such acts.[10] The fact that spouses continue to live under the same roof may raise an inference of cohabitation, but if the attempt at reconciliation is no more than an attempt, such cohabitation cannot in turn, raise an inference of condonation.[11]

(iii) The Abolishment of the Doctrine of Revival

The Divorce Act (Canada) provides:[12]

> "Any act or conduct that has been condoned is not capable of being revived so as to constitute a ground for divorce under Section 3."

This provision does not circumscribe the discretionary bar of condonation established by Section 9(1)(c). The joint operation of the two provisions may, perhaps, best be defined by reference to hypothetical facts. Consider a case where a husband committed adultery and his wife condoned the offence but the husband thereafter resumed his association with the adulteress and the acts of intimacy falling

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10 Trites v. Trites (1970) 9 D.L.R. 246 (Ont.).

11 Strachan v. Strachan (1970) 72 W.W. R 383 (B.C.S.C.).

12 The Divorce Act (Canada) 1968 s. 9(2).

short of adultery occurred. Under the law existing prior to the new Divorce Act the wife could complain of the condoned adultery by asserting revival of the offence by reason of the husband's subsequent misconduct. If the Court accepted the wife's assertion and found the condoned adultery revived, then a decree of divorce would issue as of right since the absolute bar of condonation would be erased by operation of the Doctrine of Revival.[13] Today the wife's position in the above circumstances has changed. The wife would no longer be entitled as of right to a decree of divorce because the Doctrine of Revival has been abolished. The Court would, however, now be required to exercise its discretion in accordance with Section 9(1)(c) and would grant the decree only if the Court considered that the public interest would be better served by granting it.[14]

(iv) Public Interest

In determining whether the public interest would be better served by granting a decree notwithstanding condonation on the part of the petitioner the Court will have regard to the criteria established in Blunt v. Blunt[15] wherein the discretionary bar of the petitioner's adultery was in issue. The House of Lords held that the following

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13 Cundy v. Cundy supra note 7.
Stevenson v. Stevenson (1958) 26 W.W.R. 211 n.s. (Alta.).

14 Julien Payne: "The Divorce (Canada) 1968", (1969) 8 Alta. L. Rev. at 26.

15 (1943) 2 All E.R. 1113; followed in Canada in Baia v. Baia (1970) 12 D.L.R. 5

circumstances ought to be considered in determining whether the statutory discretion should be applied in favour of the petitioner:

> (a) the position and interest of any children of the marriage;
>
> (b) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage;
>
> (c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; . . .
>
> (d) the interest of the petitioner, and, in particular, the interest that the petitioner should be able to remarry and live respectably; [and] . . .
>
> (e) the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

As already pointed out, condonation in India is an absolute bar and the Hindu Marriage Act does not have the specific provision of a

reconciliation period. The existence of condonation as an absolute bar, however, actively discourages attempts at reconciliation. One spouse may condone the act of adultery to try to save the marriage and prevent the destruction of the family. If, however, the gesture proves futile and the marriage is not saved, the ground for the divorce action is lost. Thus the law at present encourages spouses not to seek reconciliation because by attempting reconciliation and failing, they would put the eventual dissolution of their marriage in jeopardy. For this reason it is submitted that condonation in India should be made a discretionary bar so that the Court can take all the factors in the situation into account when dealing to reject or grant the petition.

[C] CONNIVANCE

(i) Absolute Bar

The essence of connivance is that the petitioner must have consented or wilfully contributed to the commission of the adultery. This necessarily implies that connivance must precede the event but the facts may be such that he is taken to have connived at it from the start if he connives at the continuance of an adulterous association. The justification of the connivance is the presence of 'corrupt intention'. In the words of Lord Wensleydale in Gipps v. Gipps:[16]

"To prove connivance it is necessary to

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16 (1864) 11 H.L. Cases 1.

> show not only that the petitioner acted in such a manner as that adultery might result; but also it must be proved that it was his intention that adultery should result."

Thus apart from express consent there can also be connivance if the petitioner creates a situation whereby adultery is likely to be forthcoming or to the other extreme end where he wilfully refuses to take steps to prevent the offence which he knows is almost bound to be committed unless he intervenes.

Consent must be freely given otherwise there is no consent at all. If consent is given in the heat of frustration and provocation the Courts very often will consider the circumstances of the particular case. In Woodbury v. Woodbury:[17] the wife on discovery of her husband's adultery with the child's governess became nervous, and while in a hysterical state as the result of the shock of the discovery wrote to the husband and to the governess letters which, in their literal meaning and when divorced from the circumstances in which they were written amounted to a licence to the husband to continue his adulterous intercourse, which in fact, the husband did. The wife subsequently petitioned for divorce but the husband raised the plea of connivance on the part of the wife. Buckwill L.J. said:[18]

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17 (1948) 2 All E.R. 684.

18 Ibid. at 690.

> "In the present case, once the adulterous intercourse had started without any fault on the part of the wife, her position, when she discovered it, was very difficult. If she, with a corrupt intention, then behaved in such a way as to promote or encourage the continuance of the adultery, to quote the words used by L. Merriman in Churchman's case[19] 'I think she should be guilty of connivance' but in my opinion, corrupt intention would mean in this case that the wife showed by her conduct that she willingly consented to the continuance of the adultery. If she showed by her conduct that she greatly desired it to cease, and communicated the desire both to her husband and his mistress, and took the best steps available to her, as she thought to stop it, I do not think she was guilty of connivance.... The principle which underlines the doctrine of connivance, that a spouse must come into Court with clean hands, and the maxim Volenti Non Fit Injuria, seems to me applicable to such a case as this. In my opinion, therefore, the letters written by the wife to the husband and the governess after she discovered that adulterous association did not amount to connivance of subsequent adultery for she had reason to believe that he would be faithful to her again for he had promised to break off the adulterous relationship".

Connivance by acquiesence takes the form of the petitioner standing by and permitting the act to take place, coupled with a corrupt intention. Sir John Nicholl[20] stated:

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19 (1945) 2 All E.R. 190; (1945) p. 44.

20 Rogers v. Rogers (1830) 3 Hag. 57.

> "The injury must be Volenti, it must be something more than mere negligence; than mere inattention; than over confidence; than dullness of apprehension; than mere indifference; it must be intentional concurrence in order to amount to a bar... but there must be a consent ... there must be evidence that he was passively concurrent; that he saw the train laid for the corruption of his wife; that he saw it with pleasure and gave a degree of passive concurrence of it".

Before there can be any question of connivance there must exist evidence that the wife is about to commit adultery or has already committed. It would be most unfair to insist that the husband should be cautious or suspicious of his wife's movements all the time. What the law requires is that if there is reasonable grounds to believe that adultery is most likely to take place and he, instead of interfering, closes his eyes and wilfully refrains from taking steps to prevent its happening, he will be presumed to intend the probable consequences of his own act and will therefore prima facie be guilty of connivance. Conversely, if he has no knowledge that the respondent is likely to form an adulterous association, his placing opportunities in the way of the respondent's committing adultery will not amount to connivance, although they might do if his suspicion had already been roused.[21] As Denning, L.J., pointed out:-[22]

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21 Phillips v. Phillips, (1844) I Rob. Ecc. 144.

22 Douglas v. Douglas, (1950) 2 All E.R. 748 at 753.

> "Once the husband suspects that an adulterous intrigue has already started, he is not guilty of connivance simply if he watches for proof of it. He is not then consenting to the inception of adultery, but only seeking for proof of its repetition. In order to obtain the proof, he may even acquiesce in its continuance, but that is not connivance... the reason is because, in connivance it is essential that there should be a corrupt intention on his part ... he is seeking to discover the offense, not to promote it or encourage it ... some people may think it discreditable of him to spy on her, but on balance it is more to the good of the community that he should be at a liberty to find out her guilt by keeping watch, rather than that she should escape its impunity."

Denning L.J. later on in Douglas v. Douglas[23] dealing with the further fact that the husband had actually created an opportunity for adultery, stated:-

> "The question is, which is the greater evil? To allow the adultery to continue undetected and unproved? Or to allow the husband to obtain his proof by creating an opportunity for it? My answer is that, if a husband honestly believes that adultery has already taken place, it is very necessary that his suspicions should either be confirmed or disproved, even by creating an opportunity for it, rather than that the suspicion of it should continue to ruin his peace of mind and his home. It is, of course, altogether different if he throws them together before he believes that adultery has taken place."

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23 Ibid. at 797.

Such is also the position under the Hindu Law and connivance till today is an absolute bar.[23A] In England "Once connivance, always connivance"[24] is not, as was once thought, a rule of law. The House of Lords in Godfrey v. Godfrey[25] held that connivance may be 'spent' if there is no effective casual connection between acts of connivance and later acts. A true reconciliation or a long lapse of time after connived adultery has taken place may, therefore break the chain of causation and make it capable of complaint as a matrimonial offence.

(ii) Discretionary Bar

The Divorce Act (Canada) 1968, does not define connivance which under it is a discretionary bar. In the English Law[26] connivance can take an active or a passive form. It is active if it consists of an act performed with the intention of promoting or encouraging the other spouse in committing a matrimonial offence.

It has already been observed that connivance is now a discretionary bar to divorce and the Courts may, but will not necessarily, exercise the discretion in accordance with the criteria defined in Blunt v.

23A See the following Indian cases where English cases were followed:
Mohan Lal v. Mohan Bai, A.I.R. (1958) Rajth. 71.
K.J. v. K., A.I.R. (1952) Nag. 395.

24 Grant: "Family Law" (London - 1970) at 81.

25 (1965) A.C. 444.

26 Rumbelow v. Rumbelow (1965) P. 207 (H.L.).

Blunt.[27] It is probable that, in exercising the discretion in respect of the petitioner's connivance, the Courts will more readily grant a divorce decree in cases of passive connivance, but there is nothing that precludes the Courts from granting a decree even though active connivance is established.[28] In all cases, however, the Court must be satisfied that the public interest would be better served by granting the decree.

It may further be pointed out that the discretionary bar of connivance is now extended beyond the context of adultery and applies in respect of all matrimonial offences which constitute grounds for divorce under section 3 of the Divorce Act (Canada) 1968. It is presumably applicable, therefore, wherever such matrimonial offence of the respondent has been caused or has been knowingly, wilfully or recklessly permitted by the petitioner as an accessory.[29]

Thus, to sum up, it is observed that connivance is where the petitioner's spouse encourages, assents to or aids in the commission of the matrimonial offence thus becoming an accessory to the offence. The aid or encouragement may, under certain circumstances, be by silent as well as spoken action, or implied consent or by so arranging

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27 (1943) 2 All E.R. 1113.

28 Julien Payne "The Divorce Act (Canada) 1968" supra note 14 at 27. See also May v. May (1952) 3 D.L.R. 725.

29 Woodbury v. Woodbury (1949) P. 154.

conditions as to assist its commission. Such action on the part of the petitioner should of course, deprive the petitioner of the aid of the Court as against the respondent and co-respondent. It is submitted that it is unnecessary to attempt a definition of connivance in India as it has been a bar to divorce for many years and is made known in numerous decisions of the Courts in England but it may be suggested that connivance in India should be made a bar within the discretion of the Court and should be changed from an absolute bar to a discretionary bar in India because it may be contrary to public policy to maintain a marriage which has completely broken down in spite of maintaining a respect for the binding sanctity of marriage.

[D] COLLUSION

(i) Hindu Law

As distinguished from connivance which is an absolute bar to a petition based on the only ground of adultery, collusion is a bar whatever may be the ground of the petition.

Collusion means an agreement or bargain between the parties to a suit or their agents[30] whereby the invitation of the suit is procured or its conduct provided for; but not every bargain entered into by parties to the pending divorce suit is collusive. An essential element in a collusive bargain is an attempt to pervert the court of

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30 Schlesinger v. Schlesinger (1959) 1 All E.R. 155.

justice. If, upon a fair consideration of the circumstances, the parties intended by their agreement, to match the institution of the suit or any aspect of its conduct with the provision of some benefit to the party instituting, or in that respect conducting the suit, there is collusion. But if there is no agreement, there can be no collusion. Hence, the fact that the respondent wants a divorce and therefore does not defend the proceedings will not amount to collusion in the absence of any bargain to that effect. There cannot be a collusion if the parties never come to an agreement but one acts independently of any bribe or inducement held out by the other.

It must be pointed out, therefore, that the distinguishing feature between connivance and collusion is, that while in connivance it is the petitioner who has, with a corrupt intention given consent to an act of adultery which is about to take place between the respondent and the co-respondent; in collusion it is the parties amongst themselves who have come to an agreement to initiate divorce proceedings with an intention to pervert the course of justice so that the marriage might be dissolved.

Mere agreement between the parties not involving an imposition on the Court of a suppression of facts but merely facilitating proof and smoothing the asperities of litigation, is not collusive or otherwise objectionable, though it is liable to be looked into by the Court. In Laider v. Laider,[31] a request by a wife to the husband to

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31 (1920) 36 T.L.R. 510.

furnish her with such evidence of his adultery as will enable her to present a petition was held not collusive unless it amounted to a suggestion that the husband could commit adultery in order that the wife may gain her freedom.

The most flagrant cases of collusion arise where the parties agree that one of them shall commit or appear to commit matrimonial offence so that the other may petition. Similarly, there is no collusion where the parties produce false evidence to prove a real case. The same principle applies where the parties agree to suppress material facts, for example, where the respondent undertakes not to raise another bar as a defence to the petition but these facts must be material.

The danger of collusion is highest when spouses wish to make arrangements while divorce proceedings are pending about such matters as the maintenance and custody of their children, the maintenance of the wife, and the disposal of the matrimonial home and its contents. This problem was discussed by Denning J., in Emanuel v. Emanuel.[32] Here he pointed out that agreements of this sort could be made with perfect propriety provided that they were entered into bona fide and with good cause, but once they become a bribe or an inducement to bring or carry on proceedings, they are collusive.

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32 (1945) 2 All E.R. 494.

The effect of collusion as an absolute bar is that once it is proved that collusion existed, the petition must be dismissed and no decree or order may be made on it. It is immaterial whether the collusive bargain was struck before or after the petition was presented, and a decree nisi may be rescinded on the ground that such an agreement was made after decree nisi and before decree absolute.

Such is the position under the Hindu Law and the present position of collusion in England after the Matrimonial Causes Act 1965[32A] is that a collusion is now only a discretionary bar and cases have been decided on this basis in and after 1965.[32B]

(ii) Canadian Law

The Joint Parliamentary Committee was of the opinion that collusion should be retained as a bar:[33]

> "But not so as to discourage or prevent negotiations between the parties or their solicitors or agents with a view to the reconciliation of spouses or the making of bona fide and proper arrangements with regard to the custody of and access to children, the maintenance of the wife or division of assets".

32A
Matrimonial Causes Act 1965 Section 5(4)(a).

32B
Gosling v. Gosling (1967) 2 All E.R. 510.
Mulhouse v. Mulhouse, (1966) P. 39.

33
Report of the Special Joint Committee of the Senate and House of Commons on Divorce (1962) at P. 32.

The Committee stated its policy:[34]

> "It is not desirable that the man and wife be kept at arm's length by a rule of law and prevented from doing what is right and honourable under the circumstances or that which may lead to reconciliation."

Section 2(c) defines collusion for the purposes of the Divorce Act as follows:

> "2. In this Act,
>
> (c) Collusion means an agreement or conspiracy to which a petitioner is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the Court but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property interests or the custody, care or upbringing of children of the marriage".

Section 9(b) of the Canada Divorce Act states:

> "9(1) On a petition for divorce it shall be the duty of the Court
>
> (b) to satisfy itself that there has been no collusion in relation to the petition and to dismiss the petition if it finds that there was collusion in presenting or prosecuting it".

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34 Ibid.

Collusion thus constitutes an absolute bar to divorce in respect of all the grounds of divorce whether matrimonial faults or marriage breakdown.[34A] It is in India an absolute bar under the Hindu Marriage Act[35] but is not defined in the Act as it is in Canada.

Collusion under English Law is also not defined by the statute[36] but it has been interpreted judicially on a number of occasions. According to these decisions the essence of collusion is that there should have been an agreement or bargain between husband and wife as a result of which one of them undertakes to bring proceedings for divorce.[37] The bar is imposed to ensure that the position does not arise whereby the Court is deprived, by the acts of the spouses, of the security for eliciting the whole truth, afforded by the contest of opposing interests (as in a defended case), and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice.[38]

34A
See also: Dutko v. Dutko (1946) 2 W.W.R. 29.
Cambell v. Cambell (1969) 2 D.L.R. 708.
Tannis v. Tannis (1970) 8 D.L.R. 333.

35
The Hindu Marriage Act 1955 Section 23(1)(c).
See also: Hall v. Hall A.I.R. (1933) Sind. 70.
Liton v. Guderin A.I.R. (1929) Cal. 599.

36
Matrimonial Causes Act 1950 (Eng.) Matrimonial Causes Act 1965.

37
Report of the Royal Commission on Marriage and Divorce, 1956 (Eng.), Cmd. 9678, P. 68, Para. 230.

38
Churchward v. Churchward (1895) P. 7.

Thus it is observed that in English practice, it may not be crucial to determine whether or not collusion is present in the case; because even if it is the Court has a discretion to grant the decree. In Canada, the matter is more serious; collusion remains an absolute bar and objectionable or not if there is collusion, the petition must be dismissed.

In Australia and New Zealand the bar is raised if there is collusion with the intent to cause a perversion of justice.[39] Both jurisdictions direct themselves against the same kind of arrangement but there is a difference in effect; in Australia the bar is absolute, and in New Zealand, discretionary. In Australia it has been held that there is no collusion unless the improper intent described in the statute is present.[40]

Thus it is submitted that collusion in India has not been defined under the Hindu Marriage Act, 1955. It is suggested that it may be defined and a section reading as follows, may be inserted in the Act:-

> "Collusion shall be a bar to divorce, being a current agreement of conspiracy to which the petitioner or respondent is a party, to effect some illegal, wrongful or improper purpose such as the bribery of

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39 (Aust.) Matrimonial Causes Act 1959 Section 40.
(N.Z.) Matrimonial Proceeding Act 1963, Section 31(a).

40 Bell v. Bell (1964) A.L.R. 29.
Grose v. Grose (1965) N.S.W.R. 429.

> a respondent or co-respondent, not to defend the action or to appear as a witness or to perform an illegal or improper act in order to furnish evidence or to pretend to do so, to give false evidence thus deceiving the Court or depriving it of an opportunity to learn the truth but an agreement for the reasonable support and maintenance of a husband or wife or children shall not be deemed to be collusive."

[E] DELAY

There is no period of limitation prescribed under the Limitation Acts of Canada and India for the presentation of the petition. Therefore, mere delay or a lapse of time is not a bar to any relief but the delay must not be unnecessary or improper. If delay is satisfactorily explained on some reasonable or plausible grounds, it would be excused. Unnecessary or improper delay would lead one to infer either insincerity in the complaint or acquiesence in the injury or a condonation of it, or connivance of it or entire indifference to it.[41]

The question of delay is always a matter for the discretion of the Court. The Court may not exercise its discretion in favour of the petitioner who has slumbered in the sufficient comfort for a space of a year or more because the inaction on the part of the petitioner shows not that he was insincere in his complaint in the sense of not believing that his wife had committed adultery but there was an

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41 Gupte: "Hindu Law of Marriage" (Bombay) (1961) at 234: see also Gyer v. Gyer A.I.R. (1949) Lah. 385
Shaw v. Shaw (1943) 3 W.W.R. 554.

acquiesence by him in the injury which he knew he had suffered.[42] Delay in presenting a petition may be reasonable if due to poverty[43] or ignorance of law[44] but it is submitted that, it being a discretionary bar, much depends upon the facts of the case.[44A]

Thus it is submitted that the consideration of the application of the bar of delay may arise in a variety of cases and it would be impossible to expect rules which may be of assistance in all the cases. Therefore, the law is satisfactory in this regard as it is.

[F] BARS TO RELIEF UNDER MARRIAGE BREAKDOWN

(i) Anticipated Future Cohabitation

Where a decree of divorce is sought pursuant to the grounds set out in Section 4 of the Divorce Act (Canada) 1968[45] it is the duty of the Court[46] to refuse the decree if there is a reasonable expectation

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42 Ibid.; see also Lowe v. Lowe (1952) 2 All E.R. 673.

43 Edward v. Edward (1900) 17 T.L.R. 384.
Key v. Key (1956) 3 All E.R. 955.

44 Pointon v. Pointon (1922) 38 T.L.R. 848.
Moreno v. Moreno (1920) 47 Cal. 1068.

44A Phillips v. Phillips (1948) 3 D.L.R. 221.
Russell v. Russell (1961) 28 D.L.R. (2d) 547.

45 Already discussed in Chapter V.

46 The Divorce Act (Canada) 1968 Section 9(1)(d).

that cohabitation will occur or be resumed within a reasonable foreseeable period. It will be observed that under this provision the Court must refuse a decree if it concludes that there is a reasonable expectation of matrimonial cohabitation within the foreseeable future. If the Court is in doubt as to the possibility of such cohabitation being established or resumed, it would seem appropriate for the Court to order an adjournment[47] in order that the opportunity for reconciliation of the spouses may be duly considered. It is submitted that the Courts will not refuse a decree unless there is a reason to believe that both spouses would be willing to resume cohabitation. The fact that one of the spouses is so willing would appear to be insufficient since matrimonial cohabitation necessarily implies a bilateral intention in the spouses to assume or resume the matrimonial relationship. Thus in Mummery v. Mummery[48] Lord Merriman P. stated:

> "I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so, but at least a resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bilateral intention on the part of both spouses so to do.

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47 The Divorce Act (Canada) 1967 Section 8(1).

48 (1942) 1 All E.R. 553.

It is submitted that Section 9(1)(d) of the Divorce Act will have a strictly limited application because, where a permanent breakdown of marriage is established, the natrual inference to be drawn is that there is no reasonable prospect that matrimonial cohabitation will occur or be resumed.

(ii) Protection of Children

Where a decree of divorce is sought because of the marriage breakdown, the Court must refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance.[49] Although the language of the provision does not so provide, it appears that the Court may order an adjournment of the proceedings for divorce for the purpose of allowing the parties an opportunity of making reasonable arrangements for the maintenance of the children of the marriage.[50]

Thus this bar to divorce is absolute and applies only where a decree for divorce is sought on the ground of marriage breakdown. The mere nature of complaint in the petition for divorce gives no justification for denying protection to the children of marriage where of divorce is sought under the matrimonial faults. In England, similar but not identical

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49 The Divorce Act (Canada) 1968 s. 9(1)(e).

50 Julien Payne: "The Divorce Act (Canada) 1968" supra note 14 at 29.

provision[51] apply to all petitions for dissolution of marriage.

(iii) Unduly Harsh or Unjust

The Divorce Act (Canada) 1968[52] imposes a duty on the Court to ensure that reasonable arrangements for maintenance for both spouses are made as a condition precedent to granting a divorce decree. The Court must refuse the decree where divorce would be unduly harsh or unjust to either spouse. In Johnstone v. Johnstone[53] the Ontario High Court interpreted the phrase "unduly harsh or unjust" as one imposing a subjective standard. If a divorce decree would cause undue hardship or injustice to one of the spouses the Court should refuse to grant it. The test of undue hardship or injustice being subjective connotes real and substantial detriment to the respondent beyond the normal consequences of the granting of a decree.

The onus is on the respondent to prove that some undue harshness or injustice would accompany the loss of the status of "husband" and "wife" of the petitioning spouse, but in Dygas v. Dygas[54] the Ontario Court of Appeal stated that it was the duty of the Court to determine that the decree was not harsh or unjust to either spouse.

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51 The Matrimonial Causes Act 1965, Section 33.

52 Section 9(1)(f).

53 (1969) 2 Ontario Repcrt 765.

54 15th May 1970 Ont. C.A. Unreported.

In Seminuk v. Seminuk,[55] the Saskatchewan Queen's Bench stated that since the Divorce Act granted equal rights to husband and wife, wives or women correspondingly lost some of their former privileges and immunities. Under this Act the wife may be equally as responsible for maintaining the husband as vice versa.

(iv) Under Hindu Law

Since the concept of marriage breakdown is not embodied in the Indian statute, all the above-mentioned bars are unknown to Hindu Law. Since the status of marriage is one in which the whole society has an interest, social stability of the society depends much upon marriage. Thus it is submitted that while incorporating the concept of marriage breakdown, the Indian Legislature should keep in mind the above mentioned bars also and change the statute accordingly.

[G] RECONCILIATION

The Canadian Reconciliation Provision[56] is far more stringent

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55 (1969) 68 W.W.R. 249.

56 Divorce Act 1968
(Canada)
"8.(1) On a petition for divorce it shall be the duty of the court, before proceeding to the hearing of the evidence, to direct such inquiries to the petitioner and, where the respondent is present, to the respondent as the court deems necessary in order to ascertain whether a possibility exists of their reconciliation, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, and if at that or any later stage in the proceedings it appears to the court from the nature of the case, the evidence or the attitude of the parties or either of them that there is a possibility of such a reconciliation, the court shall
(a) adjourn the proceedings to afford the parties an opportunity of becoming reconciled; and
(b) with the consent of the parties or in the discretion of the court, nominate
(i) a person with experience or training in marriage counselling or guidance, or

than the English[57] as they are mandatory.[58] This does not appear to have been the desire of the Joint Committee and in fact, the requirements of Section 8 have resulted mainly in brief dutiful remarks by the judges at the start of their judgments. Typical is the following statement in Bonin v. Bonin:[59]

> "Before proceeding with the matter, I directed inquiries to the petitioner in order to ascertain whether or not a possibility existed of her reconciliation with her husband, as is required of me by Section 8 of the Divorce Act. The respondent was not present in Court. I was satisfied from her replies that there was no possibility of the spouses living together again as man and wife and, accordingly, I directed the case to proceed in the usual manner."

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56 (continued)

(ii) in special circumstances, some other suitable person, to endeavour to assist the parties with a view to their possible reconciliation.

(2) Where fourteen days have elapsed from the date of any adjournment under subsection (1) and either of the parties applies to the court to have the proceedings resumed, the court shall resume the proceedings."

57 Divorce Reform Act 1969 (England)
"3. (2) If at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn for such period as it thinks fit to enable attempts to be made to effect such a reconciliation."

58 Ruth L. Deech: "Comparative Approaches to Divorce: Canada and England". (1972) Mod. L.R. 113 at 12.

59 (1969) 5 D.L.R. (3d) 533 (N.S.S.C.).

There have been attempts by judges to lighten the burden of Section 8 procedure[60] and in cases where one party refuses a reconciliation while the other one wishes, one judge has held that there is nothing they can do. In Paskiewich v. Paskiewich[61] Gregory J. said:

> "I am satisfied that the respondent, aware perhaps only by hearing at trial and for the first time unbiased evidence of what he has been doing to his wife and perhaps still unable to understand why she wants a divorce, desperately wants a reconciliation. If I thought there was 'a possibility of a reconciliation' (as it is put in section 8(1) of the Act), I would readily accede to his counsel's submission. I might in a case where it seemed not inappropriate even go farther than the Act specifically authorizes and reserve judgment so as to prevent the start of the running of the fourteen days referred to in section 8(2) and thereby give the parties unlimited time in which to try and make their marriage a success. On the evidence I find that there is no possibility of a reconciliation. I am satisfied on the evidence that the petitioner will not go back and live with her husband as his wife and I hold that there will be a reconciliation cannot create 'a possibility of a reconciliation' where the other spouse is unreconcilable."

Some lawyers are carrying out their duties under Section 7 by the following method. When a client first seeks advice on divorce his

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60 Trites v. Trites (1970) 9 D.L.R. (3d) 246 (N.S.S.C.).

61 (1969) 2 D.L.R. (3d) 622.

lawyer gives him a questionnaire designated to elicit information pertaining to the case. The questionnaire asks the petitioner whether he has considered the possibility of reconciliation and lists marriage counselling agencies in the locality; the lawyer then considers his reconciliation duties fulfilled and asks no more.

The safeguards embodied in Section 9(1) have been discussed while discussing the bars and defences to Section 4 and need no further discussion here except that they are also steps towards reconciliation.

To sum up, following are the measures for reconciliation under the Divorce Act (Canada) 1968.

Except where the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, a lawyer or advocate acting on behalf of a petitioner or respondent spouse must:

(a) draw to the attention of his client those provisions of the Divorce Act that have as their object the effecting where possible of the reconciliation of the parties to the marriage;

(b) inform his client of the marriage counselling or guidance facilities known to him that might endeavour to assist the client and his or her spouse with a view to their possible reconciliation; and,

(c) discuss with his client the possibility of the client's reconciliation with his or her spouse: s. 7(1).

The lawyer or advocate presenting the petition must endorse the petition with a certificate that he has complied with these requirements: s. 7(2).

The main provisions of the Act designed to encourage reconciliation are those which:

(1) allow a 90-day trial period of cohabitation for the purpose of reconciliation without giving rise to the bar of condonation, or without interrupting the period of separation: ss. 2(d) and 9(3)(b);

(2) reduce condonation from an absolute to a discretionary bar: s. 9(1)(c);

(3) give the court power to adjourn the hearing of the proceeding to afford the parties an opportunity of becoming reconciled; s. 8(1);

(4) give the court power to appoint a qualified or suitable person to assist the parties in becoming reconciled: s. 8(1);

(5) provide that a person so nominated by a court is not competent or compellable in any legal proceeding to disclose admissions or communications made to him in his capacity as the nominee of the court for that purpose: s. 21(1);

(6) provide that discussions between husband and wife which relate to their possible

reconciliation are protected from disclosure (quaere: whether such discussions not in the presence of a court nominee are so protected): s. 21(2).

Under the Hindu Marriage Act 1955[63] a discretion is given to the Court that before proceeding to grant any relief under this Act, it shall be its duty in the first instance to endeavour to bring about a reconciliation between the parties. The words 'in the first instance' are not happily placed in this provision because they tend to cast the duty of reconciliation only on the trial Court. Similarly the phrase "before proceeding to grant any relief" are also not happy. In any petition the Court may or may not grant any relief and in the latter case, may dismiss the petition. Does it therefore mean that the duty cast by this provision should be observed by the court only when after hearing the petition of the Court proposes to grant any relief? The intention of the legislature seems to be that before the Court proceeds with the hearing of the petition, an attempt should be made by the Court to bring about a reconciliation between the parties and therefore, it is submitted that the words used in the provision should

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63 Section 23(2)

"Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties."

have been "before proceeding with the hearing of the petition".

It is submitted that the sole object of this provision is to give effect to the laudable principle of public or social policy that the marriage tie should not be easily broken, and that therefore, the formal sundering of the tie ought at least be preceded on an earnest effort on the part of the Court. It is submitted that this provision can at best be construed as a solemn recommendation to the judge, not as a mandatory procedural direction. In other words, the provision can be changed as meaning that unless an attempt at reconciliation has been made the trial cannot proceed or would be vitiated.

Further, the Hindu Marriage Act 1955 does not have all those elaborate provisions of reconciliation that have been discussed under the Divorce Act (Canada) 1968. It is submitted that it should strive to attain these objects irrespective of the fact that there is undoubtedly room for improvement in the Canadian Divorce Act.

[H] THREE YEARS REQUIREMENT UNDER HINDU LAW

No petition for divorce under the Hindu Marriage Act can be presented within three years of marriage provided that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent.[64] This provision is based on public policy and is designed to prevent hasty recourse to legal proceedings before the parties have made a real effort to save their marriage from

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64 The Hindu Marriage Act 1955 Section 14.

diaster.[65] The provision is enacted not only to deter people from rushing into ill advised marriages but also to prevent them from rushing out of marriage as soon as they discover that marriage was not always made in heaven.[66]

What is exceptional hardship to the petitioner or exceptional depravity on the party of the respondent would be a question of fact in each case. The hardship to the petitioner or the depravity on the part of the respondent must be exceptional and not ordinary. The use of the word 'exceptional' shows that hardship or depravity, as the case may be, must be such that it would be undesirable in the interest of the petitioner to wait till the expiry of three years.

In regard to exceptional hardship and depravity, Denning L.J. in Bowman v. Bowman,[67] a case under the English statute laid down that:

> (1) Adultery with one person is not exceptional depravity;
>
> (2) Adultery with desertion by the husband in favour of another woman or with cruelty to his wife constitutes exceptional hardship to the wife;

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65 Meganantha v. Susheela A.I.R. (1957) Mad. 423.

66 Fisher v. Fisher (1948) 64 T.L.R. 245.

67 (1949) 2 All E.R. 127; See also Meghnantha v. Susheela supra note 65, where the petitioner was married in the forenoon and in the afternoon of the same day she came to know that her husband had married another woman and had a child by her, it was held that there was sufficient ground to grant leave to the petitioner.

(3) Apart from adultery coupled with another matrimonial offence, the consequence of adultery may cause exceptional hardship; e.g. where a wife has a child by her adultery;

(4) If a husband commits adultery within a few weeks of his marriage or who commits adultery promiscuously with more than one woman, or with his wife's sister or a servant in the home, that may be held to be exceptional depravity;

(5) Cruelty by itself is not exceptional but if it is coupled with aggravating circumstances such as drunkness and neglect, or if it is exceptionally brutal or dangerous to health, then even if it does not evidence exceptional depravity on the part of the respondent, it does at least cause exceptional hardship to the aggrieved spouse;

(6) If cruelty is coupled with perverted lust it shows exceptional depravity on the part of the respondent.

CHAPTER VIII

DIVORCE DECREE, ITS EFFECTS AND OTHER MATRIMONIAL RELIEFS

[A] DIVORCE DECREE AND ITS EFFECTS

(i) The Decree

A decree of divorce is granted in two stages: the decree nisi followed by the decree absolute. A decree nisi is the preliminary divorce decree, but the effect of such a decree is not to pronounce a final divorce. Spouses are not free to remarry until the decree has been made absolute. Appeal lies from the decree nisi and not from the decree absolute.

In Canada every decree of divorce is in the first instance a decree nisi and no such decree can be made absolute until three months have elapsed from the granting thereof and if the court is satisfied that every right of appeal from the judgment granting the decree has been exhausted. But if the court is satisfied that special circumstances render it in the public interest for the decree absolute to be granted before the expiration of three months from the granting of the decree nisi, the court may, upon or after granting the decree nisi, fix a shorter period after which the decree may be made absolute, or in its discretion, grant the decree absolute without further delay.[1] Such power is conditional upon the consent of the parties and their understanding that no appeal will be taken or that any appeal already taken has been

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1 The Divorce Act (Canada) 1968, Section 13(1).

abandoned.[2] Reported cases[3] also indicate that such an order is made only in special circumstances, as where the petitioning wife has filed a desertion statement, is expecting a child, and is anxious to marry the father as soon as possible so that the child can be born in wedlock.[4]

Where a decree nisi has been granted but not made absolute, any person may intervene in the proceedings to show cause why the decree should not be made absolute by reason of its having been obtained by collusion, by reason of the reconciliation of the parties, or by reason of any other material facts, and, in any such case, the court may, by order, rescind the decree nisi, require further inquiry to be made, or make such further order as the court thinks fit.[5] Application to rescind decree nisi must relate to facts material to the grounds on which the decree was granted.[6] If the petitioner does not make any application for the decree nisi to be made absolute, the respondent may apply to have the decree made absolute.[7]

In Baia v. Baia[8] the Ontario Supreme Court defined the term 'public interest' in the context of section 13 as follows:

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2 The Divorce Act (Canada) 1968, Section 13(2).

3 Cooper v. Cooper [1969] 6 D.L.R. 240.
Teskey v. Teskey [1968] 67 W.W.R. 134.
Garrett v. Garrett [1969] 1 D.L.R. 504.
Hansen v. Hansen 1 N.S.R. 877; application to postpone granting of decree absolute.

4 Fleming v. Fleming [1968] 66 W.W.R. 124.

5 The Divorce Act (Canada), 1968, Section 13(3).

6 Sherlock v. Sherlock [1970] 13 D.L.R. 255.

7 The Divorce Act (Canada) 1968, Section 13(4).

8 [1970] 12 D.L.R. 545.

> "The term is to be restrictively interpreted so as to refer to the public interest in the integrity of marriage in the process of granting a divorce. Public interest is in favor of:
>
> (a) protecting and maintaining existing marriages;
>
> (b) encouraging reconciliation of the spouses in the divorce proceedings;
>
> (c) granting divorce on liberal new grounds;
>
> (d) protecting the future security of children and spouses as a disrupted family unit;
>
> (e) retaining safeguards in the existing laws against abuse of divorce proceedings."

Where special circumstances indicate it is advantageous to permit spouses to rebuild their new lives by speedily setting up new family units, then it is in the interest of the public of Canada to permit them to do so since this is socially beneficial. On the other hand personal advantages such as obtaining tax exemptions by remarrying in December rather than January are not in the public interest and the discretion of the court should be warily exercised in this type of situation, so that normal three months period is not evaded.

Under the Hindu Marriage Act,[9] a decree passed would be a final decree until it is reversed in appeal. Such a decree is not analagous to a decree nisi under the Canadian law. A decree nisi, as stated above is only a conditional decree; it does not change the status of the spouses until it is made absolute. A decree under the Hindu Marriage Act is not a conditional decree; it would be in the nature of a decree

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9 The Hindu Marriage Act 1955, Section 13(1).

absolute determining the status of the parties and would be equivalent to a judgment in rem.[10]

It is submitted that the Hindu Marriage Act, 1955, does not have any provision for decree nisi and the decree passed under it is a decree absolute. This is a matter in which the interest of the community must be weighed against the interest of an individual. It is in the interest of the community that the process of law should not be abused by the taking of false or collusive proceedings. It is thus submitted that the first decree in India should also be a decree nisi for three months so that those who have objections can intervene and to keep the suit open before a decree absolute is passed. Moreover, these three months will give the parties another chance of reconciliation if they wish to reconcile before the decree is made absolute.

(ii) The Effect

After the decree has been made absolute the parties are free to marry as if the prior marriage has been dissolved by death. A number of ancillary orders may be made on divorce proceedings. It is not proposed to give those ancillary orders in detail as it is beyond the scope of this thesis. Only a brief outline of such ancillary orders are therefore mentioned.

The Divorce Court may make an order with respect for the custody, care and upbringing of the children of the marriage, i.e., which party

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10 Vempa Sunanda v. Vampa, A.I.R. [1957] A.P. 424.

is to have custody of them and on what terms.[11] Statutory provisions relating to maintenance and to the disposition of matrimonial property on dissolution of marriage are but different aspects of the court's duty to see that as far as possible justice and equity are done financially to both the parties and to the children of the marriage.[12] When a decree of dissolution of marriage has been made, a readjustment of the property rights of the spouses may be required if consequential injustice to one or both of the spouses and the children is not to result.[13] These orders are made for the purpose, so to speak, of tidying up some of the wreckage of the marriage which has resulted from the parties' litigation, and come under the general title of 'ancillary relief'. All these are important matters, and it is obviously undesirable, in any case, that they be left too much to chance, or to agreement between the parties which may turn out later to have been unwise.[14] Accordingly, statutory powers are vested in the courts and such ancillary orders may be made by them.

(iii) Definition of Statutory Powers

Although the husband's common law obligation to maintain his wife terminates on annulment or dissolution of the marriage, statutory powers

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11 The Divorce Act (Canada), 1968, Section 11(i)(c).

12 Dempsey v. Dempsey [1967] 11 F.L.J. 61.

13 Lansell v. Lansell [1964] 110 C.L.R. 353.

14 Inglis "Family Law", (New Zealand) (1968, 2nd ed.) at 165.

are vested in the courts to order maintenance and other benefits to be provided for a party to a marriage which is annulled or dissolved. The powers may be categorized as follows:

(i) A power, in an action for annulment of marriage, to order the husband to secure to the wife a gross or annual sum of money for any term not exceeding her life[15] and/or to pay to the wife during their joint lives a weekly or monthly sum of money for her support and maintenance.[16]

(ii) A power, upon granting a decree nisi of divorce, to order either the husband or the wife to secure or to pay a lump sum or periodic sums for the maintenance of his or her spouse and/or the children of the marriage.[17]

(iii) A power, where the husband has obtained a divorce on the ground of his wife's adultery, to order that damages awarded against the co-respondent shall be settled for the benefit of the wife and for the children of the

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15 Domestic Relations Act R.S.A. 1970 Chap. 113, Section 23(1).

16 Domestic Relations Act R.S.A. 1970 Chap. 113, Section 23(2).
Matrimonial Causes Act, R.S.O. 1960, Ch. 232, Sec. 2.
Queen's Bench Act, R.S.S. 1965, Ch. 23, Sec. 33(2).

17 The Divorce Act 1968, Section 11.

marriage.[18] It would appear that no similar power extends to those jurisdictions, such as Manitoba, New Brunswick, Nova Scotia, Ontario and Saskatchewan, wherein the common law action for criminal conversion has been maintained.

(iv) A power, where the husband obtains a decree of divorce on the ground of his wife's adultery, to order that the whole or part of any property of the wife, whether in possession or reversion, shall be settled for the benefit of the husband and/or the children of the marriage.

(v) A power, where a final decree of nullity or dissolution of marriage is pronounced, to order the variation of any ante-nuptial or post-nuptial settlement for the benefit of the children of the marriage and/or their respective parents.

Professor Julian Payne[19] points out that the co-existence of the

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18 Domestic Relations Act R.S.A. 1970 Chap. 113, Section 14.

19 Julian Payne: Corollary Financial Relief in Nullity and Divorce Proceedings - Permanent Orders, Reproduced for the Seminar in Developments in Divorce Law. Unpublished - Edmonton, April 14, 1970, at 7 and 8.

above statutory powers tends to result in anomalies by reason of the absence of total reciprocity of obligation between the spouses. It is accordingly submitted that amending legislation should be enacted to place husband and wife on an equal footing with respect to orders for financial relief in nullity proceedings and orders for settlements of property in divorce proceedings.

(iv) Maintenance in Divorce and Nullity Proceedings

Section 11(1) of the Divorce Act (Canada) 1968 provides as follows:

> "Upon granting a decree nisi of divorce, the court may, if it thinks fit and just to do so, having regard to the conduct of the parties and the conditions, means and other circumstances of each of them, make one or more of the following orders, namely:
>
> (a) An order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of both or either,
>
> (i) the wife, and
>
> (ii) the children of the marriage.
>
> (b) An order requiring the wife to secure or to pay such lump sums or periodic sums as the court thinks reasonable for the maintenance of both or either,
>
> (i) the husband, and
>
> (ii) the children of the marriage.

It may be pointed out that legislation empowering the courts to order permanent maintenance in nullity proceedings has been enacted in several provinces, including Alberta, British Columbia, and Ontario.[20] In the absence of any provincial statute expressly authorizing the award of maintenance in nullity proceedings, the right to maintenance in such proceedings is dependent upon the principles applied by the ecclesiastical courts.[21]

(v) Order Made Upon Decree Nisi

The power of the court to make corollary orders pursuant to section 11(1) of the Divorce Act (Canada) 1968 is exercisable 'upon granting a decree nisi of divorce'. Such orders cannot be made, therefore, if the petition for divorce is dismissed. Rejection of the corollary claim in the above circumstances would not appear unreasonable if, in consequence of the dismissal of the petition for divorce, the parties resume matrimonial cohabitation and re-establish their respective maintenance rights and obligations.

It is rare, however, for these consequences to ensue and a spouse may therefore be unjustifiably denied reasonable provision for him or her separate maintenance. It is accordingly submitted that the courts should be statutorily empowered to order maintenance in favor of either

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20 Domestic Relations Act R.S.A. 1970, Chap. 113, Sec. 23.
Queen's Bench Act R.S.S. 1965, Chap. 73 Sec. 33.
Matrimonial Causes Act R.S.O. 1960 Chap. 232 Sec. 1 & 2.

21 Brown v. Brown [1909] 10 W.L.R. 120 (B.C.).

party, notwithstanding the dismissal of the petition for divorce, where such an order appears reasonable in the circumstances of the case.[22]

(vi) Discretion in Granting Relief

The granting or withholding of an order for secured or unsecured maintenance is within the discretion of the trial judge. The courts have, in the past, refused to lay down any specific rules governing the exercise of the discretion and each case must ultimately be decided on its own particular facts. It has been stated, however, that the discretion should be exercised not capriciously but cautiously and carefully, and, as far as possible, consistently with the interests of the parties themselves and the interests of public morality and of decent society.

Section 11(1) of the Divorce Act (Canada) 1968, specifically declares that the court shall, in the exercise of its discretion, have regard to the conduct of the parties, and the condition, means the other circumstances of each of them. The relevant considerations thus defined would appear more exhaustive than the considerations designated in previous legislation, namely the fortune, if any, of the wife, the ability of the husband, and the conduct of the parties.

(vii) Effect of Order under Deserted Wives' and Children's Maintenance Act

An order obtained under a provincial Deserted Wives' and Children's Maintenance Act does not preclude maintenance as corollary relief in

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22 Julien Payne: Supra note 19 at 16.

subsequent divorce proceedings; on the contrary, the order ceases to have effect upon the dissolution of the marriage and it is the duty of the trial court in the divorce proceedings to consider and adjudicate any application for maintenance and to grant such relief as appears reasonable in the circumstances.[23]

(viii) Conditions and Restrictions on Maintenance Orders

Section 12 of the Divorce Act (Canada) 1968 provides that where an order for corollary relief is made pursuant to sections 10 or 11 of the Act, the court may

> (a) direct that any alimony, alimentary pension or maintenance be paid either to the husband or wife, as the case may be, or to a trustee or administrator approved by the court; and
>
> (b) impose such terms, conditions or restrictions as the court thinks fit and just.

(ix) Duration of Orders

Section 11(1) of the Divorce Act (Canada) 1968 would appear to confer an unfettered discretion upon the court with respect to the duration of orders for maintenance, whether secured or unsecured. Pursuant to such discretion, the court may presumably direct that an order for maintenance shall continue for a definite period or cease on the occurrence of a future event, for example, the divorced wife's remarriage or the divorced husband's retirement from gainful employment, and such an order may be

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23 Clydesdale v. Clydesdale [1959] 17 D.L.R. (2nd) 429 (B.C.).

qualified by leave to apply for a further order on the expiration of the period or the occurrence of the event. It is probable that an order made subject to the above limitations could be modified or rescinded pursuant to Section 11(2) of the Divorce Act (Canada) 1968 if a material change of circumstances warranted variation or rescission of the order before the designated period or event, but it would appear desirable for the court to eliminate all doubt in this context by expressly reserving a power in either party to apply for variation or discharge of the order.

(x) The Usual Amount

There has been a long-established practice whereby maintenance would usually be awarded to a wife in an amount representing one-third of the husband's net income,[24] but the rigid application of the so-called one-third rule has been regarded as inappropriate where the husband's income is very large and is exceedingly difficult to apply where the parties have only limited means.[25] Professor Julien Payne accordingly concludes[26] that there is no rule whereby the wife is entitled to any specific proportion of the husband's income or of their joint income, where the wife has independent means, and that the rigid application of a fixed arithmetical formula cannot operate consistently with the discretion

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24 X v. X [1933] 2 W.W.R. 413.

25 X v. X [1933] 2 W.W.R. 413 at 415.

26 Julien Payne: Supra Note 19 at 25.

conferred by Section 11 of the Divorce Act (Canada) 1968.

(xi) Variation and Recission of Maintenance Order

The Divorce and Matrimonial Causes Act (England) 1866, Section 1, authorized the court, where the husband became unable to pay the monthly or weekly sum ordered for the maintenance of his wife, to discharge, modify, or temporarily suspend the order in whole or in part. The same or similar powers were conferred in several Canadian jurisdictions by provincial statutes or rules of court. In some provinces such statutes or rules of court provide not only for decreasing the amount of maintenance ordered where the husband became unable to make the payments, but also for increasing it where his means increased or those of his wife decreased. No power of variation was conferred, however, with respect to orders to secure maintenance made under Section 32 of the Divorce and Matrimonial Causes Act (England) 1857, or under provincial statutes or rules of court relating thereto.

The provisions of the Divorce Act (Canada) 1968, which regulate the powers of the court to vary or rescind corollary orders for maintenance made pursuant to Section 11(1) of the Act, are visions or rules of court and would appear to confer a wide discretion on the court. Section 11(2) of the Divorce Act (Canada) 1968 provides as follows:

> "11 (2). An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them."

(xii) Effect of Remarriage

There is no express requirement in Section 11(2) of the Divorce Act (Canada) 1968 that the court shall vary or rescind a corollary maintenance order in the event of the subsequent remarriage of either party[27] and such remarriage must be regarded only as relevant and not decisive to a determination of the right to variation or recission of an order.[28]

(xiii) Effect of Death

The right to enforce an order for maintenance is personal to the spouse in whose favor the order has been made and does not pass on death to his or her personal representatives. By virtue of the Divorce Act (Canada) 1968, Section 11(1), the court may presumably make an order for unsecured maintenance for any term not exceeding the life of the recipient. If an order is made for such a term, the order will apparently be enforceable on a continuing basis against the estate of the deceased spouses.[29]

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27 Compare Matrimonial Causes Act, R.S.O. 1960, Ch. 232, Sec. 2(1)(c) which provided that payments made under an order for unsecured maintenance by way of monthly or weekly sums 'shall cease on the wife marrying again'. Compare also Domestic Relation Act R.S.A. 1970, Sec. 26(1) and Queen's Bench Act ,R.S.S. 1965, Ch. 73, Sec. 37(1), whereby the misconduct or the remarriage of the wife was expressly declared a ground on which a maintenance order might be varied, modified or temporarily suspended. For recommendation that the remarriage of the wife should automatically extinguish her right to claim or receive maintenance from her former husband, see Report of the Royal Commission on Marriage & Divorce (England) 1951-55; Working Paper No. 9: Matrimonial and Related Proceedings - Financial Relief (April 1967), paras. 40 and 69.

28 Julien Payne - Supra Note 19 at 27.

29 Ibid. at 31.

(xiv) Settlement of Wife's Property

Section 45 of the Divorce Act and Matrimonial Causes Act (England) 1857 authorized the court, where a divorce was granted to a husband on the ground of his wife's adultery, to order that the whole or part of any property of the wife, whether in possession or reversion, be settled for "the benefit of the innocent party and of the children of the marriage, or either or any of them". Similar though not identical statutory provisions have been enacted in several Canadian provinces[30] but in Ontario the corresponding discretionary power to order a settlement of the wife's property may only be exercised for "the benefit of the children of the marriage or their issue or any or either of them".[31]

The object of the above statutory provision is to make good the pecuniary damage caused by the wife's matrimonial misconduct and the court will have regard to the probable pecuniary position which the husband, the wife and the children would have enjoyed if the marriage had not broken up. The power of the court is not intended to be used as a punishment of the wife and/or of the co-respondent through the wife.

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30 Domestic Relations Act R.S.A. 1970 Ch. 113 Section 22
Divorce and Matrimonial Causes Act R.S.B.C. 1960, Ch. 118, Sec. 34.
Queen's Bench Act R.S.S. 1965 Ch. 73, Sec. 35.

31 Matrimonial Causes Act, R.S.O. 1960, Ch. 232, Section 3.

(xv) Variation of Marriage Settlement

Section 5 of the Divorce and Matrimonial Causes Act (England) 1859 empowered the court, where a final decree of nullity or dissolution of marriage was pronounced, to order the variation of ante-nuptial or post-nuptial settlement for the benefit of the children of the marriage and/or their respective parents. There are similar provisions in the statutes of several Canadian provinces[32] but in Ontario the corresponding provision empowers the court to vary marriage settlements only where a decree of divorce is pronounced and only for the benefit of the children of the marriage.[33]

Where an order for the variation of a marriage settlement has been made, it cannot be subsequently modified although it may be revised in the light of circumstances existing at the date of the order, which were not brought to the attention of the court.

Indian Law

The courts in India have similar power to grant ancillary relief as in Canada, but the statutory powers are not exhaustively defined. The courts in India may give the following ancillary relief:

(xvii) Maintenance Pendante lite and Expenses of Proceedings Under Hindu Law

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32 Domestic Relations Act R.S.A. 1970 Chap. 113, Section 24.
Supreme Court Act R.S.B.C. 1960 Chap. 874, Section 14.
Queen's Bench Act R.S.S. 1965 Chap. 73, Sec. 34.

33 Matrimonial Causes Act R.S.O. 1960 Ch. 232, Sec. 4.

Section 24[34] of the Hindu Marriage Act deals with maintenance pending any proceedings under the Act and expenses of such proceedings. It enables the court on the application of either spouse to order that the expenses of the proceedings be paid to the applicant and likewise a monthly sum during the proceeding, having regard to the applicant's own income and the income of the respondent. The object is to ensure that a party to a proceeding does not suffer during the pendency of the proceedings by reason of poverty and such party may be either the petitioner the respondent in the petition in which the application is made.[35] The court is entitled to make an order for the husband as well as the wife where it appears to the court that the husband or the wife as the case may be, has no independent income sufficient for her or his support and/or the necessary expenses of the proceeding. It is submitted that this is a step forward from the Special Marriage Act 1954[36] by giving an equal status to husband and wife and has allowed even the husband to make an application for alimony or expenses of proceedings from the wife if his income is not sufficient for his support.

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34 Section 24. "Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable."

35 Gupte: "Hindu Law of Marriage" (Bombay - 1961) at 239.

36 The Special Marriage Act 1954, Section 36.
See also The Indian Divorce Act 1954, Section 36.

The grant of maintenance pendente lite and expenses is discretionary with the court. The guiding principle is that if the applicant has no independent means he or she is entitled to maintenance and expenses unless good cause is shown for depriving him or her of it, and in determining what is a 'good cause' the court, as pointed out in Mukan Kunwar v. Ajeet Chand,[37] should consider whether:

(a) the applicant is being supported by the adulterer, and

(b) the respondent has not sufficient means.

(xvii) Permanent Alimony and Maintenance under Hindu Law

Section 25 of the Hindu Marriage Act deals with permanent alimony and maintenance.[38] The court has jurisdiction to make an order not only

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37 A.I.R. [1958] Rajth 322.

38 The Hindu Marriage Act, Section 25:
(1) "Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under subsection (1), it may at the instance of either party vary, modify, or rescind any such order in such manner as the court may deem just.
(3) If the court is satisfied that the party in whose favor an order has been made under this section has remarried, or, if such party is the wife, that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

at the time of passing a decree but at any time subsequent thereto. There is no time limit fixed within which such application should be made after the passing of the decree. An order may be made on application made to the court for the purpose of either spouse. Such an application may be made by the petitioner, whether the petitioner be the wife or the husband. The amount to be awarded by the court is for maintenance and support, and not for any other purpose. The court will therefore take into consideration the bare requirement of the applicant to enable him or her to maintain himself or herself consistently with his or her position and status in society.[39]

The court may award maintenance either in one lump sum or by monthly or other periodical instalments. The court has power to charge the amount of maintenance awarded by it on the immovable property of the respondent in order to secure it to the applicant. This power extends to any immovable property of the respondent whether it is within its jurisdiction or not.[40] The court may revise its order from time to time. Any substantial change in the income and property of the applicant or respondent would proportionately reduce or increase the quantum of maintenance previously awarded. The court may even rescind the order if either the position of the applicant or that of the respondent does not warrant it or the court is satisfied that the party in whose favor the order has been made has remarried. Where the order was made in favor of

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39 Gupte, "Hindu Law of Marriage" supra note 35 at 244.

40 Ambalal v. Sharadadevi [1955] 57 Bom. L.R. 499.

the wife, she has not remained chaste; or where the party is the husband, he has had sexual intercourse with any woman other than his wife.[41]

(xviii) Custody of Children under Hindu Law

Section 26[42] of the Hindu Marriage Act 1955, enables the court from time to time to pass such interim orders and make such provisions in a decree as it may deem just and proper with respect to the custody, maintenance and education of minor children. The court is not only empowered to make such order but from time to time to revoke, suspend or vary any of the orders previously made. It enjoins upon the court to take into consideration the wishes of minor children whenever possible.

(xix) Disposal of Property under Hindu Law

The court has been given power[43] to make certain provisions in

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41 The Hindu Marriage Act, Section 25(3).

42 The Hindu Marriage Act 1955, Section 26:
"In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made."

43 The Hindu Marriage Act 1955, Section 27.
"In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife."

a decree in regard to the joint property presented at marriage. The power has been given only in respect of one species of property belonging jointly to both the spouses, namely property presented at or about the time of marriage.

[B] JUDICIAL SEPARATION

The decree of judicial separation is a creature of statute and was first introduced by the Matrimonial Causes Act, 1857, to replace the old ecclesiastical decree of divorce 'a mensa et thoro' which that Act abolished.[44] In England the ecclesiastical courts prior to 1858 granted orders of judicial separation (otherwise known as 'divorce mensa et thoro') as matrimonial reliefs under certain circumstances. After 1857 the power to grant these reliefs was transferred to the court for divorce and matrimonial causes under the Imperial Matrimonial Causes Act 1857, and this power is the part of the inherent jurisdiction of the courts of Canada in the provinces of Alberta, British Columbia, Manitoba, and Saskatchewan. In India, even before the Hindu Marriage Act came into force the decisions have had established that the Hindus could approach the court for judicial separation notwithstanding that such proceedings were unknown to Hindu law as such. It was held that a suit for judicial separation lay in the courts of British India, although there was no such thing as judicial separation where parties to a marriage were Hindus; if a wife deserted for any cause not affecting her caste or the authority of marriage and the desertion was in consequence not irrevocable in its nature such desertion resembled what was called judicial separation in

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44 Bromley: "Family Law" (Butterworth) (1962 - 2nd ed.).

other systems.[45] But now the Act specifically lays down the grounds.[46]

A judicial separation has been described as in effect a divorce in the modern sense without the right to marry again.[47] Lord Buckmaster in Hyman v. Hyman[48] stated:

> "Judicial separation which has been the subject of much learned and mighty censure, is nothing but enforcing through an order of the court an arrangement which the parties could - were they willing - equally effect for themselves; it merely makes in the form and with the force of a decree an arrangement for the parties to live apart."

(i) Grounds for Judicial Separation in Canada

Mere lack of marital harmony does not justify a judicial separation.[49] The Domestic Relations Act[50] provides four grounds on which a petition for judicial separation may be based. These are that the defendant has since the celebration of the marriage been guilty of any of the four matrimonial faults,

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45 Gupte: "Hindu Law of Marriage" supra note 35 at 172.

46 The Hindu Marriage Act 1955, Section 10.

47 Poope v. Poope (1940) 3 D.L.R. 454.

48 (1929) A.C. 601.

49 Timms v. Timms (1910) 13 W.L.R. 636.

50 Section 7.

(a) adultery;

(b) cruelty;

(c) desertion either for two years or more without reasonable cause, or through non-compliance with a decree of restitution of conjugal rights;

(d) sodomy, bestiality or an attempt to commit these unnatural offences.

These are on the whole similar to the grounds in England after 1858 which were in effect in Alberta before the Domestic Relations Act was passed.

The grounds under the Imperial Matrimonial Causes Act 1857 are applicable in Manitoba[51] and British Columbia.[52] By the Act of 1860[53] the New Brunswick courts have the jurisdiction of the ecclesiastical courts in England immediately before the Imperial Matrimonial Causes Act 1857 came into force. The ecclesiastical courts granted a divorce '_a mensa et thoro_' on the grounds of adultery,[54] cruelty,[55] and unnatural offences.[56] In Nova Scotia the court in _Pennie_ v. _Pennie_[57] stated that

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51 (Man.) _A_ v. _A_ 15 Man. R. at 494.

52 (B.C.) _Watts_ v. _Watts_ (1908), A.C. 573.

53 1860, 23 Vict. Ch. 37.

54 _Babineau_ v. _Babineau_ (1924) 4 D.L.R. 951.

55 _Ritchie_ v. _Ritchie_ (1953) 2 D.L.R. 730.

56 _Babineau_ v. _Babineau_ supra note 54.

57 (1966) 52 M.P.R. 68.

the grounds are co-extensive with those under the Imperial Matrimonial Causes Act 1857. In MacKinnon v. MacKinnon[58] the court stated that the Supreme Court of Prince Edward Island possesses jurisdiction to decree judicial separation by virtue of the Act of 1959[59] which conferred on this court the powers of the court of divorce under the Act of 1835.[60] Because of the change in terminology under the Act of 1835, the technically correct way of expressing the jurisdiction of the court in Prince Edward Island is to state it has jurisdiction to grant a decree concerning divorce and separation from bed and board which would have in some respects only the same force and consequence as a judicial separation granted under the Imperial Matrimonial Causes Act 1857, namely,

> (a) releases from the obligation to share the matrimonial home; and
>
> (b) the right to alimony, pendente lite and permanent.

The Queen's Bench Act[61] provides four grounds in Saskatchewan on which the relief of judicial separation may be obtained:

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58 (1964) 44 D.L.R. 2nd 433.

59 1949, Geo. VI, Ch. 10, P.E.I.

60 1835, P.E.I., Ch. 10.

61 See the Queen's Bench Act R.S.S. 1965 Ch. 73, Section 25-28.

(a) adultery;

(b) cruelty;

(c) Sodomy, bestiality or an attempt to commit these offences;

(d) desertion without reasonable cause for two years, or desertion through non-compliance with a decree of restitution.

(ii) Grounds for Judicial Separation in India

Under the Special Marriage Act, 1954, the grounds of judicial separation and divorce are identical. But under the Hindu Marriage Act 1955 they are separate for the following reasons:

> .....In considering this and the following clauses, the Joint Committee have taken into account the language employed and the scheme adopted by the Parliament. In view, however, of the fact that Hindu Law has so far recognized polygamy, the Joint Committee feels that the approach to the problems of judicial separation and divorce need not necessarily be the same in both the cases and that it is neither necessary nor desirable in the present case that grounds for judicial separation and grounds for divorce should be identical as in the Special Marriage Act, 1954. Moreover, having regard to the high ideals which the Hindu Community has always lived up to, divorce should not be made easy and the law should be so framed as to provide the maximum opportunities for mutual adjustment. The scheme of this Bill is therefore slightly different.[62]

Either party to a marriage, whether solemnized before or after the Act, may seek judicial separation by petition on any one or more of the following grounds:

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62 See Report of the Joint Committee, dated 25th Nov. 1954, P. iv Gaz. of India, Extra, Part II dated 4.12.1954
D.H. Chaudhari, "The Hindu Marriage Act" (1955) at 146.

(1) Desertion by the respondent for a continuous period of two years immediately preceding the presentation of the petition;

(2) Cruelty on the part of the respondent.

(3) The other party has been suffering from a virulent form of leprosy for not less than one year immediately preceding the presentation of the petition;

(4) The other party has been suffering for three years from venereal disease in a communicable form, not contracted from the petitioner.

(5) The other party has been continuously of unsound mind for two years;

(6) The other party has after the solemnization of marriage had sexual intercourse with any person other than his or her spouse. (Section 10).

The wife is entitled to claim judicial separation under the Hindu Marriage Act, 1955, or maintenance under the Hindu Adoption and Maintenance Act, 1954, on the same grounds. The two reliefs are separate and provided by different Acts. It seems, therefore, that if a wife obtains a decree for maintenance, she does not forfeit her right to claim judicial separation on the same ground. Where, however, the period of desertion is less than two years or duration of leprosy is less than one year, the wife can only claim maintenance under the Hindu Adoption and Maintenance Act. 1954.[63]

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63 Section 18(2). See also S.P. Khetarpal "Codification of Hindu Law" in "Family Law and Customary Law in Asia" (Hague) (1968) at 225.

(iii) The Decree and its Effects

A plaintiff in an action for divorce may make an application that the claim be changed to one of judicial separation provided that the latter remedy is sought before the decree absolute and there is no intention or improper and collateral motive.[64] The decree of judicial separation unlike the decree of divorce takes effect immediately it is pronounced and is a decree absolute. [65]

The decree of judicial separation does not effect any change in the matrimonial status of the parties, but their rights are altered. The principle change in the parties' rights is that neither is entitled to insist on cohabitation with the other and this was a principal effect of the earlier divorce 'a mensa et thoro'. So long as the order is in force neither spouse can be in desertion and a husband who has intercourse with his wife against her will may be guilty of rape.[66] The modern judicial separation order, however, has results which are much more extensive.

In Alberta, if a decree has been pronounced the property of the wife in the event of her dying intestate during the continuance of her separation devolves as if her husband was dead.[67] Neither of them is at liberty to remarry but for all other purposes the wife is reckoned sui juris and as an independent person. The wife during the continuance of

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64 David v. David (1953) 4 D.L.R. 470 (B.C.); "The aggrieved party is the one to choose the relief to be granted. A guilty party cannot move for a decree of divorce and....has no say in the choice of the decree." (per Davey, J.).

65 Gustafson v. Gustafson (1935) 2 W.W.R. 286 at 384 (Sask.).

66 R. v. Clarke (1949) 2 All E.R. 448.

67 The Domestic Relation Act, R.S.A. 1970, Chap. 113, Sec. 12.

the separation is considered as a femme sole for the purpose of the contract and wrongs and injuries and suing and being sued in a civil proceeding.[68] But under the Hindu Marriage Act a decree of judicial separation does not dissolve the marriage tie but for all other purposes the spouses remain husband and wife such as the right to succeed to each other's property, the duty to remain faithful to each other, and the common law disability arising from coverture continue in force, e.g., neither husband nor wife can sue each other in tort.[69]

It is submitted that the Indian legislature should incorporate the concept, as in Alberta, of femme sole and the wife should be able to acquire a separate status than that of the husband.

Both in India and Canada, in the case of judicial separation where alimony has been ordered, the husband is liable for the necessaries supplied for the use of the wife.[70]

The question whether judicial separation would enable a married woman to follow a domicile of her own was left undecided by the House of Lords in the case of Advocate v. Jafferey.[71] The Privy Council, however, in the case of Attorney-General of Alberta v. Cook[72] held that a

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68 The Domestic Relations Act R.S.A. 1970, Chap. 113, Sec. 11(b).

69 The Hindu Marriage Act 1955, Section 10.

70 Domestic Relations Act R.S.A. 1970, Chap. 113, Section 13(2)
The Hindu Marriage Act 1955, Section 25.

71 (1921) 1 A.C. 146.

72 (1926) A.C. 444.

decree of judicial separation did not enable a wife to acquire a domicile different from that of her husband's domicile and that consequently she was not entitled to sue for a decree in a court other than that of the husband's domicile. But in Alberta, the wife is regarded as an independent person after judicial separation for all purposes and thus can acquire a new domicile from that of her husband.

In addition the court has power to make ancillary orders as in divorce which have already been discussed. However the outline of such orders are produced:

(i) Interim order for the payment of alimony to the wife pendente lite.[73]

(ii) Permanent alimony for the wife.[74]

(iii) If the petitioner is a husband, damages for the husband against the adulterer for adultery with his wife.[75]

(iv) Custody, maintenance and education of the children.[76]

(v) Settlement of wife's property.[77]

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73 The Domestic Relations Act R.S.A., 1970, Chap. 113, Sec. 17(1)
The Hindu Marriage Act 1955, Section 24.

74 The Domestic Relations Act R.S.A. 1970, Chap. 113, Sec. 18(1).
The Hindu Marriage Act 1955, Section 25.

75 The Domestic Relations Act R.S.A. 1970, Chap. 113, Sec. 14.

76 The Domestic Relations Act R.S.A. 1970, Chap. 113, Sec. 44.
The Hindu Marriage Act 1955, Section 26.

77 The Domestic Relations Act R.S.A. 1970, Chap. 113, Sec. 22.
The Hindu Marriage Act 1955, Section 27.

(vi) An injunction may be granted to prevent any apprehended disposition by the defendant of his real or personal property.[78]

(iv) Discharge of Decree

In India, the resumption of cohabitation will not automatically put an end to a decree for judicial separation. Despite such resumption the decree will continue to subsist until it is rescinded by the court. Resumption of cohabitation will normally be a ground of such rescission but an application to the court for discharge is necessary. There is no such provision in Alberta; it seems an application has to be made by either party to discharge the decree if the parties resume cohabitation. There are similar provisions in England and the petitions under it are hardly brought to court. It is doubtful whether such a decree is automatically discharged.[79] Under the Indian Divorce Act, 1869, it has been held that the resumption of cohabitation annuls the decree of judicial separation. Under the Hindu Marriage Act the petitioner can apply and obtain a decree of divorce if the respondent has not resumed cohabitation for a space of two years or upwards after the passing of the decree of judicial separation.[80] It seems in Canada a person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce by reason only that the petitioner

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78 The Domestic Relations Act R.S.A. 1970, Chap. 113, Sec. 20.

79 Bromley, "Family Law" supra note at 193.

80 Hindu Marriage Act 1955, Section 13(1)(viii).

has been granted a judicial separation upon the same facts as though proved in support of the petition for divorce. It also seems that in Canada the petitioner can bring an action for divorce for marriage breakdown under Section 4(1)(e)(i)[81] after a period of three years or upwards since the passing of a decree of judicial separation if the respondent has not resumed cohabitation.

(v) Bars and Defences

In Canada and India the court will not grant a decree of judicial separation if the plaintiff has

(a) in any case where judicial separation is sought on the ground of adultery, been accessory to or connived at the adultery of the other party, or

(b) condoned the matrimonial offence complained of, or

(c) Presented or prosecuted the claim in collusion with the respondent, or

(d) during the existence of the marriage committed adultery that has not been condoned.

The Morton Commission[82] considered that judicial separation should be retained in England as an alternative remedy to divorce and was of the opinion that the petitioner should have the discretionary power to

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81 See under Marriage Breakdown, Chapter VI

82 Cmd. 9678 (1956), Paras. 303, 313.

elect either remedy. It is submitted that it should be retained in India also and the Act should leave the choice between divorce and judicial separation to the individual who desires relief to decide which form of remedy he should seek. The Gorell Commission[83] recommended the court should have the discretionary power, on the application of the respondent to make a decree of divorce instead of judicial separation. But it is submitted that it would place an extremely difficult, if not impossible task upon the court, since where an applicant has deliberately chosen the remedy of judicial separation, it is difficult to see on what basis the court would be justified in substituting a decree of divorce. Thus it is essential that the applicant be afforded an unfettered freedom of choice of his remedy.

[C] RESTITUTION OF CONJUGAL RIGHTS

Although the right to consortium has been likened to the rights attached to ownership, in one important respect this analogy breaks down, for as between the spouses the duty to cohabit is legally completely unenforceable. The doctrine of unity of personality prevented either spouse from suing the other at common law, and consequently the only remedy which a deserted spouse had before 1858 was to petition in the ecclesiastical courts for a decree of restitution of conjugal rights. The decree called upon a spouse in desertion to resume cohabitation with the petitioner, and if it was disobeyed the respondent would be excommunicated. The power to excommunicate on this ground was abolished

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83 Cmd. 6478 (1912), Paras. 374, 375.

by statute in 1813 and was replaced by a power to commit for contempt,[84] but this was in turn abolished by the Matrimonial Causes Act 1884, since when there has been no direct sanction for failure to comply with the decree at all.[85] The Act of 1884 compensated for this by enacting that disobedience to a decree of restitution should be deemed to be desertion on the part of the respondent and that the petitioner might immediately petition for judicial separation, whilst under the modern statutes failure to comply with the decree is no longer deemed to be desertion, they have preserved the petitioner's right to petition for judicial separation.

The principle on which decrees for restitution of conjugal rights are based is that it is the duty of marriage people to live together unless there is a reason which the law recognizes as sufficient justification for the refusal to do so.[86] The Act of 1857[87] required the court in suits for restitution to proceed and act and give relief on principles and rules which in its opinion are as nearly as may be conformable to those on which the ecclesiastical courts had acted and

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84 Ecclesiastical Courts Act, 1813; see also Bromley: "Family Law" (Butterworths) (2nd ed. 1962) at 156-157.

85 See now the Matrimonial Causes Act, 1965, s. 13(2).

86 Weldon v. Weldon [1883] 9 P.D. 52; it really means a suit to oblige one of the spouses to afford those matrimonial amenities which the marriage tie renders obligatory: Henn Collins, J. in Fassbender v. Fassbender [1938] 3 All. E.R. 389.

87 Imperial Matrimonial Causes Act 1837, Section 22.

given relief,[88] but in the leading Alberta case[89] decided prior to the present provincial statute, Beck, J.A. expressed the opinion that the Alberta court was not thus restricted in the exercise of its jurisdiction but could, unrestrictedly, give or refuse relief upon wide principles of justice and equity, having regard to the matrimonial state and its obligations and the relationship and conduct of both parties. Since under the Alberta statute the matter is now in the discretion of the court, this view will undoubtedly be applied in this province[90] and also in Saskatchewan where similar legislation has been enacted[91] but it does not yet appear that the courts in those other western provinces where the Act of 1857 is still in force, are prepared to go quite so far in declaring their independence of the directions laid down in Section 22. Hudson, J. in Watson v. Watson held:[92]

> "In a suit for restitution of conjugal rights it is incumbent upon a petitioner to prove that the respondent has refused, and still refuses, to render conjugal rights, and in order to satisfy the burden of proof the petitioner had to prove a demand and refusal; and it is implicit that the petitioner must be willing and able to take the other spouse back. But, it is not necessary, as it is in this case, to prove desertion affirmatively. The parting preceding a suit for restitution

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88 Harthan v. Harthan [1948] 2 All E.R. 639 (C.A.).

89 (Alta.) O'Leary v. O'Leary [1923] 19 Alta. L.R. 224.

90 Hauk v. Hauk [1951] 2 W.W.R. 331; Bell v. Bell [1939] 1 W.W.R. 106.

91 (Sask.) The Queen's Bench Act, 1960, Ch. 35.

92 Payne: "Power on Divorce" (Burroughs) (2nd. ed. 1964) at 240-41.

> of conjugal rights may have originated in desertion by the petitioner." Hodgson, J. in Watson v. Watson.[93]

(i) The Decree in Canada

The action for restitution of conjugal rights does not lie while cohabitation continues.[94] Either spouse may bring the action although as a rule it is brought by the wife.[95]

The form of the judgment for plaintiff in an action for restitution of conjugal rights is that the husband take the petitioner home and receive her as his wife and render her conjugal rights.[96] If the judgment was disobeyed the ecclesiastical courts would send the respondent to jail for contempt[97] but in Alberta, provincial legislation provides that no judgment for restitution of conjugal rights shall be enforced by attachment.[98] The defendant, on failure to comply with the decree of restitution of conjugal rights, shall be deemed to have been guilty of desertion without reasonable cause and an action for judicial separation may be forthwith brought and a judgment therefore pronounced although two

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93 [1938] P. 258.

94 Orme v. Orme [1824] 162 E.R. 335.

95 O'Leary v. O'Leary [1923] 1 W.W.R. 501.

96 Brodie v. Brodie [1917] P. 271.

97 Weldon v. Weldon, supra note 96; an instance in which the wife was imprisoned for disobedience to the order.

98 (Alta.) The Domestic Relations Act, R.S.A. 1970, ch. 113 Sec. 4.

years may have elapsed since said failure.[99]

In India, there are certain judgments of the courts where judges have exhibited that old notions about the female dependency have changed and wide discretion of the courts in the decrees of restitution of conjugal rights is of great use in the Hindu society, especially when the marriage bond is on the verge of breaking up due to misunderstandings of the spouses or the intrigues of the relation.[100] Even before the Hindu Marriage Act, it was insisted by the courts that marital intercourse not only should continue but in exceptional cases it will exercise a sound judicial discretion by imposing conditions upon a decree to secure the welfare of the wife.[101] Before this act, unlike England, the action for restitution of conjugal rights was, according to Privy Council,[102] in the nature of a suit for specific performance. But the Act gave a statutory recognition to this remedy.[103]

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99 (Alta.) The Domestic Relations Act, R.S.A. 1970, ch. 113, Sec. 4 See also (Sask) The Queen's Bench Act, 1960, Ch. 35, Sec. 24 & 25 which has similar provisions like Alberta.

100 B.S. Sinha: "The Hindu Marriage Act 1955: An Experiment in Social Legislation." [1968] S.C.D. Vol. 8, 23 at 33.

101 Binda v. Kaunsilia [1883] A.I.R. (All) 126: "The court observed that the texts of Hindu law relating to conjugal cohabitation and imposing restriction upon the liberty of wife, and placing her under the control of her husband, are merely moral precepts but rules of law."

102 Munshee Buzloor v. Shumsoonia (1909) 11 M.I.A. 551.

103 Section 9 of the Hindu Marriage Act runs as follows:
(1) Where either the husband or the wife has without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply to the District Court for restitution of conjugal rights and the court on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted may decree restitution of conjugal rights accordingly.
(2) Nothing shall be pleaded in answer to a petition of restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

(ii) The Decree in India

The foundation of the right to bring a suit for restitution of conjugal rights in India is the fundamental rule of matrimonial law (as in England and Canada) that one spouse is entitled to the society, comfort and consortium of the other spouse and where either spouse was abandoned or withdrawn from the society of the other without reasonable excuse or just cause the court shall grant a decree for restitution.[104] The courts while dealing with this remedy have taken care to see that a reasonable cause to leave the other party actually existed.[105] The exact test of reasonable cause is, however, difficult to law down and it varies with the changed social circumstances of the society.[106]

If the husband or wife satisfies the court that the other spouse has left him or her without just cause and has refused to render conjugal rights, the court will pronounce a decree for restitution of conjugal rights. The decree orders the spouse to return home to the petitioner within a specified time. It is submitted that non-compliance with the decree is still a ground for divorce in India. There is no longer any justification for keeping the remedy of restitution of conjugal rights because there are no steps which the court can take to enforce its order that conjugal rights be rendered and the order is in fact rarely obeyed. The remedy does not serve any useful purpose and thus it is submitted that the decree of restitution of conjugal rights should be abolished.[107]

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104 Mulla: "Principles of Hindu Law" (Bombay 13 ed. 1966) at 642.

105 Gurdev Kaur v. Sarwan Singh, A.I.R. [1959] Punj. 162.

106 Gurucharan Singh v. Waryam Kaur, A.I.R. [1960] Pun. 422.

107 See Matrimonial Proceedings and Property Act 1970 Section 20 by which the decree of restitution of conjugal rights has been abolished in England.

CHAPTER IX

Quebec Family Law

In this thesis no comparison has been made with the law of the Province of Quebec since the law there is in the civil tradition, as contrasted to the law governing the common law provinces. The bulk of the family law in Quebec is to be found in the civil code and the procedure is also codified in the code of civil procedure. In Quebec the petitioner should always look to the relevant articles of the code before examining what the courts have decided in the past and in many instances the code articles will provide a complete answer. It is for these reasons that no comparison has been made. However, an outline of the law of Quebec is given for the sake of completing the research for all the provinces of the Canadian law and to find out if anything more could be learned for suggesting reforms for the Hindu law.

[A] MARRIAGE LAWS:

(i) Capacity

A man cannot contract marriage before the age of 14 years, nor a woman before the age of 12 years.[1] However, this incapacity is not absolute and is covered when six months have elapsed since the party concerned attained the proper age without proceedings in nullity of marriage having been instituted, or if the wife has conceived before that six months' period has expired.[2]

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1 Art. 115 C.C. See also, J. Castel, "The Civil Law System of the Province of Quebec" (Butterworth) (1962) at 80.

2 Art. 153 C.C.

Minors must obtain the consent of their father or of their mother before contracting marriage.[3] In the absence of a parent a tutor must be named to the child for this purpose.[4] This ground of nullity may only be invoked within six months of the date when a person whose consent was required became aware of the marriage.[5] Marriage is prohibited between ascendants and descendants and between persons who are connected by marriage[6] and this nullity is absolute. A valid marriage may be contracted between persons who are related by marriage if the marriage which produced the relationship has been dissolved by death of one of the consorts, but not if the dissolution of the marriage was by divorce:[7] thus, a man could not divorce his wife in order to marry his sister-in-law.

A person who is already married cannot marry a second time before the dissolution of the first marriage.[8]

Finally, a person who is unable to exercise his will freely, by reason of insanity, or other cause, cannot marry since there is no marriage when there is no consent.[9]

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3 Art. 119 C.C.

4 Art. 122 C.C.

5 Art. 151 C.C.

6 Art. 124 C.C.

7 Art. 125 C.C.

8 Art. 118 C.C.

9 Art. 116 C.C.

(iii) Formalities Concerning Solemnization

Marriage must be solemnized openly and publicly,[10] and in order to establish that the required publicity has been given it is required that banns be published prior to the marriage; that the marriage be celebrated by a competent officer recognized by law, and that witnesses be present. Publication of banns is made in accordance with the rules of the particular religious community concerned and an exemption from this requirement is possible if these religious authorities so permit.[11] The persons competent to celebrate marriage are all priests, rectors and ministers authorized by law to keep registers of acts of civil status, i.e., any recognized person in charge of a church, congregation or religious community.[12] At least two persons must be present at the ceremony and must sign the act of marriage.[13]

Since 1968 civil marriage has also been possible in Quebec. Civil marriages are performed by the Prothonotary of the Superior Court for the judicial district in which the marriage is to be solemnized.[14] Instead of the publication of banns notices are posed up and the marriage ceremony takes place in the Court House.[15]

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10 Art. 128 C.C.

11 Art. 134 C.C.

12 Arts. 129 and 44 C.C.

13 Art. 64 C.C.

14 Art. 129 C.C.

15 Arts. 130 and 134(a) C.C.

(iii) Oppositions to Marriage

A little-used procedure is provided by which opposition to a proposed marriage can be made by a person having an interest in doing so.[16] The procedure is strict and summary and if the opposition is dismissed the opponent, other than the father or mother, may be condemned to pay costs and damages.[17] The persons who may make an opposition to marriage are as follows: a person already married to one of the future consorts;[18] the father or in default of the father the mother in the case of the proposed marriage of a minor;[19] the tutor in the case of the proposed marriage of a minor where there is no mother or father;[20] grandparents, uncles, aunts or first cousins where there is neither mother, father nor tutor;[21] any person related or allied to a proposed consort who is insane although not interdicted for insanity.[22]

[B] NULLITY

(i) Causes of Nullity

The causes of nullity of marriage are (i) lack of consent, which may

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16 Art. 821 C.C.P.

17 Art. 825 C.C.P.

18 Art. 136 C.C.

19 Art. 137 C.C.

20 Art. 136 C.C.

21 Art. 139 C.C.

22 Art. 141 C.C.

be invoked only by the parties themselves and only if raised, if the parties continue to cohabit, within six months after the cause of the lack of consent ceased to exist;[23] (ii) consorts of insufficient age;[24] (iii) lack of parental consent to the marriage of minors;[25] (iv) marriage between persons related or allied;[26] (v) lack of essential publicity;[27] (vi) solemnization by an incompetent officer;[28] (vii) existence of a prior marriage.[29]

(ii) Actions to Annul Marriage

The action in nullity of marriage is instituted before the Superior Court.

A marriage although declared null produces civil effects in favor of either or both of the husband and wife and with regard to the children, if contracted in good faith.[30] If only one party was in good faith the marriage produces civil effects in favor of that party alone, and in

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23 Arts. 148 and 149 C.C.

24 Art. 154 C.C.

25 Arts. 150 and 151 C.C.

26 Arts. 152 and 155 C.C.

27 Arts. 156 and 157 C.C.

28 Art. 156 C.C.

29 Art. 118 C.C.

30 Art. 163 C.C.

favor of the children issue of the marriage.[31] The request that the marriage produce civil effects must be made in the conclusions to the action to annul the marriage since the failure of the court to pronounce civil effects constitutes an implicit and final refusal that they exist.[32] The judgment can both pronounce the civil effects and fix their nature and extent, e.g., the judgment may fix the amount of alimentary pension payable by one spouse to the other. Marriages producing civil effects are referred to as putative.[33]

[C] DIVORCE

Unlike other provisions of the Dominion, including Ontario, Quebec has always steadfastly refused to sanction any legislation leading to divorce. However, litigation directed to a permanent separation from bed and board has been long recognized in this province.

Until the enactment of the Divorce Act of Canada in 1968, divorce was not recognized by the civil law of Quebec which, until recently, declared that marriage was indissoluble except by the death of one of the consorts. Divorce was nevertheless available to Quebec domiciliaries by way of Resolution of the Senate of Canada passed in accordance with the Dissolution and Annulment of Marriages Act.[34] The supremacy of the

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31 Art. 164 C.C.

32 Goodfellow v. Smith (1968) C.S. 427.

33 For a more detailed description of the putative effects of a null or annulable marriage, see Trudel "Traite de Droit Civil du Quebec" 1942 ed. Vol. I, p. 462 & ff.

34 1963 Statutes of Canada 12 Eliz. II Chap. 10.

federal power in matters of divorce was acknowledged.[35] Following the enactment of the Divorce Act the provincial legislature enacted Bill 8,[36] which not only amended the Civil Code to expressly state that marriage can be dissolved by a divorce legally granted,[37] but also amended other sections of the Code so as to bring them into conformity with the provisions of the Divorce Act insofar as they relate to matters of alimentary pension, custody of children, etc. The judge will decide in the same way as the case would be judged by courts in the other provinces of Canada. Judicial decisions from other Canadian courts are cited with effect in Quebec court in divorce matters, except of course with respect to matters of procedure which are dealt with by the provisions of the Quebec Code of Civil Procedure and the Special Rules of Practice enacted for divorce matters in accordance with Section 19 of the Divorce Act.

[D] OTHER MATRIMONIAL CAUSES

(i) Judicial Separation

Separation from bed and board is a remedy which is still extensively used to resolve the problem arising from unhappy marriages, although the coming into effect of the Divorce Act has reduced somewhat the occasions when recourse to this remedy is requested. Either party may demand a

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35 Gauvin v. Rancourt (1953) R.L. p. 517.

36 1969 Statutes of Quebec 18 Eliz. II Chap. 74.

37 Art. 185 C.C.

legal separation on the ground of the other's adultery[38] but the most commonly invoked ground is that of outrage, ill usage and grievous insult,[40] and there is a tendency on the part of the courts to give these terms a broad and liberal interpretation. The refusal of a husband to receive his wife and to furnish her with the necessities of life according to his rank, means and condition may also give rise to a separation.[41]

Although separation from bed and board does not dissolve the marriage tie,[42] it relieves the parties from the obligation of living with each other, dissolves the matrimonial regime, and the judgment ordinarily decides the custody of any children, visiting rights, and the alimentary obligations of the parties.[43] The judgment as to custody and alimentary matters is variable or may be rescinded depending upon the conduct of the parties or any change in the condition, means or other circumstances of them.[44]

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38 Arts. 187 and 188 C.C.

39 Art. 189 C.C.

40 Art. 190 C.C.

41 Art. 191 C.C.

42 Art. 206 C.C.

43 Art. 212 C.C.

44 Art. 213 C.C.

Even after a final judgement in separation from bed and board, its effects are completely extinguished by a reconciliation of the parties, except that a community of property is not automatically re-established by such a reconciliation.[45]

While the action in separation is pending before the courts, the court may on motion provisionally decide upon the custody, maintenance and education of the children, relieve the wife of her obligation to live with her husband and order one consort to pay an alimentary pension to the other consort for his or her maintenance and the maintenance of the children during the suit, having regard to the means and needs of each of the parties.[46] In many cases it is upon the motion for provisional measures that the most vigorous contestations take place, since the delay between that hearing and final adjudication of the action on its merits usually exceeds one year.

(ii) Maintenance and Alimony

Although alimentary support is most commonly claimed in conjunction with the other matrimonial proceedings such as an action for separation from bed and board or a divorce, an independent claim for alimony and maintenance may also be made, either between husband and wife or between the other persons having alimentary rights and obligations. The persons between whom these rights and obligations exist are:

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45 Art. 217 C.C.

46 Art. 200 C.C.

(1) Husband and wife;[47]

(2) Parent and child;[48]

(3) Other ascendants and descendants such as grandparents and grandchildren;[49]

(4) Sons-in-law and daughters-in-law towards their fathers- and mothers-in-law, but for so long only as the marriage producing the relationship continues: however, even if the marriage has been dissolved by death or divorce the obligation continues if there were and are children issue of the marriage.[50]

All of the above obligations are reciprocal, e.g., the grandparent in need may ask for alimentary support from his grandchild, but the grandchild is also entitled to demand support from his grandparent if it is the grandchild which is in need. These obligations are also hierarchical, so that a claim for alimentary support must first be exercised against the closer relative, if there is one. These provisions are not restricted in any respect as to the age of the person claiming alimentary support but maintenance is only granted in proportion to the

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47 Art. 173 C.C.

48 Art. 165 C.C.

49 Art. 166 C.C.

50 Art. 167 C.C.

wants of the party claiming it and the means of the party by whom it is due.[51] When the ability to pay an alimentary allowance is changed, either favorably or unfavorably, or if the needs of the party receiving an alimentary allowance are altered by some change in his circumstances, an increase or a reduction of the amount of the allowance may be demanded by means of petition to the court.[52] The courts tend to restrict the alimentary recourse to cases where real need has been demonstrated; thus, a father will not be ordered to pay an alimentary pension to his son who is lazy and makes no effort to obtain work or to support himself by his own efforts.[53]

All suits relating to the alimentary obligation between consorts or between relatives or in-laws are brought by way of motion and are heard and decided by preference.[54]

(iii) Ancillary Relief

In actions for separation from bed and board and divorce matters, the court has jurisdiction to grant ancillary relief, both provisionally during the pending of the suit and upon granting of the decree. Custody of children and alimentary allowances are such matters. Either party may be asked by the court to pay allowance to the other and the minor

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51 Art. 169 C.C.

52 Art. 170 C.C.

53 Rodier v. Rodier 1969 B.R. p. 966.

54 Art. 827 C.C.P.

children of the home. In Quebec it has been held that arrears of alimony cannot be claimed unless it can be established that the party who has not paid has evaded payment by fraudulent means.[55]

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55 Racine v. Boivin (1939) 44 R.L. n.s. 410.

CHAPTER X

CONCLUSION

[A] DIVORCE ACT (CANADA) 1968 - RESUME

Marriage is traditionally recognized as the foundation of society. Through marriage two human beings find mutual support and comfort and are able to ensure for themselves a richer and fuller life. Ideally marriage should be based on love and affection, economic benefit and security, and should provide an environment in which future generations are born and reared. Society is vitally concerned in the preservation of marriage, for by fostering the institution of marriage it is preserving itself.[1]

Nevertheless, human beings are not creatures of perfection and it must be recognized that some marriages will not last for long. In almost all society, divorce has been recognized in some form. When a marriage fails no service is rendered to either society or the parties themselves by preserving the legal shell of relationship that no longer exists as a fact. Divorce therefore cannot be alienated from society.[2] A good Divorce law should seek to achieve the following objectives:

(1) to buttress, rather than to undermine

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1 Proceedings of the special joint committee of the Senate and House of Commons on Divorce, No. 1, final report, 1967, (Queen's Printer) at p. 41.

2 Ibid.

3 The Law Commission - U.K.

the stability of marriage and

(2) when, regretably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with maximum fairness, and the minimum bitterness, distress and humiliation.

The Divorce Act (Canada), 1968 endeavours to achieve these twin objectives. It seeks to buttress the stability of marriage by providing safeguards throughout the Act for reconciliations. The provisions for reconciliation are found primarily in Section 7, 8 and 21, and may conveniently be divided into the duties of the lawyer and those of the courts.

Section 7 of the Act makes it the duty of the lawyer to draw to the attention of his clients the reconciliation provisions of the Divorce Act, to inform them of marriage counselling facilities known to him and by section 7(c) to discuss with his clients the possibility of a reconciliation. Now, while Section 7 may be a laudable principle, it is submitted to be totally unrealistic. The lawyer is not a marriage counsellor; he does not have time to counsel; he probably in most cases would not take time if he had it: effective counselling requires the presence of both parties and this would raise ethical problems for the lawyer and in any event counselling at this stage is probably too late.

Probably the most important power of the court in being able to maintain or buttress the institution of marriage is found in the provisions for Reconciliation. In this respect it appears as though the Canadian

Courts have been very liberal in applying the provisions of Section 8. The position in Canada is to afford the maximum opportunity to reconcile a marriage that appears to be in the potential stage of breaking down. The Divorce Act allows the parties to cohabit and take up what constitutes a normal marital relationship for a period of up to ninety days before the parties are said to have jeopardized or lost grounds for a pending divorce. There will be said to have been neither condonation, nor connivance in this respect.

From the tenor of Section 8, it is quite apparent that the courts would be very reluctant to afford one party, the opportunity to use the reconciliation period as a means of obtaining grounds or fortifying grounds for subsequent proceedings.

This provision is very stringent. This does not seem to have been the desire of the Joint Committee and what the requirements of Section 8 have resulted mainly in brief dutiful remarks by the judges at the start of their judgment. Typical is the following statement in Bonin v. Bonin[4]

> "Before proceeding with the matter, I directed inquiries to the petitioner in order to ascertain whether or not a possibility existed of her reconciliation with her husband, as is required of me by section 8 of the Divorce Act. The respondent was not present in Court. I was satisfied from her replies that there was no possibility of the spouses living together again as man and wife and, accordingly, I directed the case to proceed in the usual manner."

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4 (1969) 5 D.L.R. (3d) 533 (N.S.S.C.).

There have been attempts by judges to lighten the burden of section 8 Procedure, and in cases where one party refuses a reconciliation while the other wishes one, judges have held that there is nothing they can do.[5] In some cases judges immediately find from the circumstances that reconciliation is unlikely:[6] in others, they are willing to apply the section in the spirit in which it was intended. Thecases[7] have further pointed out that a nominee under Section 21[8] will not be required to disclose any information that he has acquired during his appointment.

The fact of marital breakdown is something which section 4(1)(e) cleary recognizes, but because of the interpretations put on these

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5 Paskiewich v. Paskiewich (1969) 2 D.L.R. (3d) 622 (B.C.S.C.).

6 I.C. v. G.C. (1970) 9 D.L.R. (3d) 632 [Transvestism]
Flemming v. Flemming, (1968) 69 D.L.R. (2d) 710; Respondent untraceable, petitioner living with another woman by whom he had a child.

7 Cronkwright v. Cronkwright (1971) 14 D.L.R. 271
Robson v. Robson (1969) 2 O.R. 857.

8 21. (1) A person nominated by a court under this Act to endeavour to assist the parties to a marriage with a view to their possible reconciliation is not competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as the nominee of the court for that purpose.

(2) Evidence of anything said or of any admission or communication made in the course of an endeavour to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings.

sections, one finds that certain principles or faults have come to exercise too much weight in these matters. As has been suggested, the broad view of the three year period of living separate and apart should be adopted so as to avoid consideration as to fault. This means that the phrase 'for any reason' should be given a broad and liberal application so as to include such things as mutual agreements to live apart or judicial separation or even situations where the parties have been drawn apart by certain uncontrollable forces.

The attempt to apply the requirement of 'intent' to section 4(1)(e)(i) and (ii) has particularly caused a great deal of difficulty and often injustice on the part of the courts. It would seem much more reasonable to dispense with this requirement of fault particularly in circumstances where it is quite apparent that the parties have no intention whatsoever of cohabiting again.

But often the courts refuse to recognize the realities of the situation that there is obviously no longer any intention or even possibility of taking up marital life again so requiring animus separendi and a definite life apart would not be just in that the other party may still have some feelings towards the other but only in the humanitarian sense.[9] The instances of insanity and the fact that

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Gladman v. Gladman (1969) 6 D.L.R. 350.
H. v. H. (1970) 9 D.L.R. 722.
Herman v. Herman (1969) 3 D.L.R. 551.
Kallwies v. Kallwies (1970) 12 D.L.R. 206.
Kennedy v. Kennedy (1969) 2 D.L.R. (3d) 405.

the other party is incurably insane should be enough to enable the petitioner to make use of the three years period. The courts ability to exercise its discretion in respect of connivance and condonation is a further indication that parliament has come to recognize that it would be fruitless to require the parties to continue cohabiting.

It becomes necessary to mention the principle as laid down in Blunt v. Blunt[10] which is extremely important in respect of the court particularly under Sec. 9. Such factors as the maintenance of children, the possible effect that a divorce would have on the respondent, the division of property, the chance of subseque nt marital happiness, any hope of reconciliation and subsequent cohabitation, are the considerations the court will look into in deciding whether or not to grant a divorce.

Such is the position under the Canadian Divorce Act and the Hindu Marriage Act should strive to attain these objectives. Nevertheless there is undoubtedly room for improvement in the Canadian Divorce Act. As was mentioned, the fault principle could be abolished. It may become necessary to find a different way of arriving at a divorce in respect of the matrimonial offences and they may eventually become subservient to an overriding principle of marriage breakdown. Thus it has been suggested that the existing laws of divorce in Canada should be re-framed on the basis of the new principle which is already adopted

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10 (1943) 2 All E.R. 1113; See also 'Public Interest' under Chapter VII.

by England[11] i.e., "doctrine of breakdown of marriage". This can be achieved by requiring the court to determine in each case whether the marriage has broken down beyond hope of reconciliation. This approach may provide the basic remedy for divorce seekers in the future. If anything, it is quite ridiculous to attempt to maintain a union which no longer has any substance to it.

[B] SUMMARY OF SUGGESTIONS

The salient features of the suggestion that have been made in previous chapters are outlined here.

(i) Marriage is frequently, although by no means invariably, preceded by a contract to marry or engagement or bethrothal as known in India. In the United States and England, an engagement to marry has no legal effect and claims for damages for breach of promises are abolished. Whatever may be the position in these countries, there may be still some people in Canada and India to whom such a right should be available and such persons should not be denied the right. It may therefore be advocated to support the continuation of such a right of action both in India and Canada. It is also submitted that an Indian woman should have a right to bring an action for seduction in her own right.

(ii) It has also been pointed out that the Dowry Prohibition Act is a piece of ambitious social legislation of which India has yet to see the actual impact on society. It is submitted that the Act should be

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11 Matrimonial Proceeding Act 1965 Section 1.

more strict and the authorities should be on a constant lookout for punishing the offenders. By removing the practice of Dowry the position of women in India would be considerably enhanced in society.

(iii) The question whether the existing 'Prohibited Degrees of Relationship' are adequate or whether they should be altered is partly biological and partly social and moral. The answer to this must depend upon public opinion. Would public opinion tolerate it or would it object to such unions? Does it wish to extend the prohibition to great uncles and great nieces and great nephews and great aunts? It has therefore been suggested that for India and Canada the prohibited degrees should be curtailed and reduced to a minimum.

(iv) As regards the question of age for marriage with consent, it varies from 12 to 21 years within the provinces of Canada. The age of absolute capacity ranges from 18 years to 21 years. There are some indications that marriages of people under 21 years are less likely to be enduring than marriages of people over that age. Considering all the aspects it has been submitted that the present minimum age for the solemnization of marriage (with consent and without consent) is satisfactory and requires no immediate change.

(v) The Hindu law of marriage unlike the Canadian law does not have any provisions as regards medical requirements of health prior to the marriage. It has been submitted that it is desirable to have such a provision in the Act to ensure health offsprings and a happy marriage.

(vi) Another measure, namely, registration of marriage provided under the Hindu Marriage Act, 1955, which would have discouraged the

practice of child marriage in an indirect way, has not been fully implemented. Registration of marriages would obviously require the parties or their parents to furnish all the details, including the age of the parties to the concerned authority. Registration will also facilitate proof of marriages and moreover the state will have an exact statistic of how many marriages have taken place in a given year.

(vii) The conclusion in the chapter of Annulment has been reached that the decree of nullity is much less important than a divorce decree and moreover the law regarding nullity is not wholly clear and is unsatisfactory. It is submitted that the decree of nullity should be abolished and instead, all the grounds of voidable marriage should be retained and new grounds may be added to it. Such new grounds are imprisonment, certain mental illnesses, concealment of his or her matrimonial status, habitual drinking and addiction to drugs.

(viii) Divorce being a new remedy granted by the Hindu Marriage Act 1955, in the absence of Indian decisions the principle of the law of divorce as understood in England may be applied; but the application must be consistent with Indian notions and ideas of the rights and duties of the spouses to one another and also, the parties being Hindus, with notions of Hindu Marriage Act being a sacrament and not a contract. It appears doubtful whether the provisions relating to nullity, dissolution of marriage and judicial separation could conform with the modern needs of society. Many grounds which could rightly have been and which are conceded in many countries as sufficient for divorce proceedings have been considered in the Act as giving cause for the proceedings for judicial separation only (e.g., Desertion or Cruelty). It may be suggested that the single act of adultery (which is now a

ground for judicial separation only) and desertion for 3 years should also be made as additional grounds for divorce. The Act should leave the choice between divorce and judicial separation to the individual who desires relief to decide which form of remedy he should seek.

(ix) It has also been suggested that the concept of marriage breakdown should be introduced in India as it will not only help people whose spouses are unable to get a divorce because of the lack of evidence to prove the requisite ground of matrimonial fault, but would also put the Hindu Law of Divorce on the same footing as the Divorce Law of Canada.

(x) The decree of divorce under the Hindu law is granted in one stage i.e., decree absolute only. It is submitted that it should be in two stages namely decree nisi and decree absolute and the whole purpose of suggesting this is to give the parties an opportunity to reconcile with one another.

(xi) The decrees of judicial separation are comparatively rare and they are sought mainly by petitioners with conscientious objection to divorce and by some wives who, while refusing to give their husbands their freedom, require the help of the court in connection with maintenance and matters relating to children. It is submitted that the law should not be changed in this respect and that the remedy for judicial separation should be retained. It has also been suggested for India that a woman should be regarded as a <u>feme sole</u> and should be allowed to acquire a separate domicile from that of her husband as in Alberta while judicially separated.

(xii) It has been suggested that since the wife can now apply for maintenance on the ground of the husband's wilful neglect to provide reasonable maintenance for her or the children, there is no longer any justification for keeping the remedy of restitution of conjugal rights. Moreover there are no steps which the court can take to enforce its order that conjugal rights be rendered and the order is in fact rarely obeyed.

(xiii) Condonation is an absolute bar under the Hindu Marriage Act and it has been suggested that it should be a discretionary bar as under the Divorce Act (Canada) 1968. It has also been suggested that the doctrine of revival should be abolished.

(xiv) Connivance has not been defined under the Hindu Marriage Act. It has been pointed that it is unnecessary to attempt a definition of connivance as it has been a bar to divorce for many years and is made known to numerous decisions of the courts in England but should be made a discretionary bar.

(xv) Collusion in India has not been defined under the Hindu Marriage Act. It has been suggested that a clause may be added in the Hindu Marriage Act containing a wide and comprehensive definition of collusion.

(xvi) Last but not least, it must however be admitted that the present codification of the Act (Hindu Marriage Act 1955) constitutes a big step forward towards attainment of the Directive Principle recognized by the Indian constitution that the state shall endeavour to secure for its citizens a uniform civil code throughout the territory of India. A civil code, which will replace all the existing personal laws,

appears to be essential in the interest of the unification of the country, and building a single nation with one single set of laws to each and every person resident in India.[12]

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12 Similar conclusion has been given by Dr. Khetarpal in "Codification of Hindu Law" in Family Law and Customary Law in Asia [Hague] (1968) 202 at 232.

APPENDIX I

CONSTITUTIONAL CONUNDRUM

It was pointed out in Chapter I that the British North America Act, 1867 provides for the division of the law making powers between the Federal Dominion Parliament and the legislatures of the Provinces. Section 91 of the Act is a general section which indicates the classes of subjects with reference to which the Dominion Parliament may enact laws applicable to the whole of Canada. The limits on the generality are contained in Section 92 which provides for those areas in which the provincial legislatures have exclusive law making power.[1] Whilst this Section may have been inappropriate to social conditions prevailing over 100 years ago, today, these Sections, in view of the interpretations placed upon them are a source of social-legal problems. Some of these problems are caused by the sloth of the Dominion Parliament in enacting laws in areas in which it is clearly empowered to do so, others by the activity of the provincial legislatures which have enacted laws in areas which fall either within the sphere of activity of the Dominion or into a no-man's land between the Dominion and the Provinces. The purpose of this Appendix is to analyze the exact legislative powers of the Dominion and the Provinces since a mere outline has been mentioned in Chapter I.

[A] INTERPRETATIONS OF THE B.N.A. 1867 WITH REFERENCE TO FAMILY LAW

These provisions of the B.N.A. Act have become a source of much

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1 See the relevant provisions of Sec. 91 and 92 at Chap. I page 46.

difficulty in the development and interpretation of family law in Canada.

The first problem is one of the extent of the Dominion Parliament's law making power under Section 91(26).[2] Section 91 has been subject to varying interpretations.

Some Constitutional lawyers[3] are of the view that neither the Dominion Parliament nor the Provincial Legislatures were given any authority or jurisdiction, exclusive or otherwise, over any field of law. The law making authority was not over the field (eg. field of family law) but over the matter arising in the shape of concrete legislation which "came within" the field (eg. marriage and divorce). This view gave a restrictive interpretation to the classes of subject listed in Section 91.

Other Constitutional lawyers[4] take the view that the Dominion Parliament has comprehensive legislative powers over all matters, some of which types are enumerated in Section 91; and that this comprehensive

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2 .....[26] Marriage and Divorce and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislature of the province.

3 See The O'Connor Report to the Senate of Canada on the B.N.A. Act, 1939, Annex 1. pages 25-30.

4 See MacDonald: The Constitution in a Changing World: (1948) 26 Can. B.R., 21 at page 29.

legislative ambit is only restricted to the extent that Section 92 gives the provincial legislatures certain specific areas of a local nature within which the provinces may legislate. This view is also supported by some Privy Council[5] and Supreme Court of Canada[6] judgments and opinions in references.

Yet another constitutional view is that the list of topics contained in Section 92 is exclusive to the provinces and despite the general language of the subjects listed under Section 91 the Dominion Parliament[7] may not legislate with reference to these topics.

Conversely, any legislation of a local nature pertaining to the needs of the province may be enacted by the provincial legislatures,[8] even if it appears to fall under a general subject matter listed under Section 91.

A problem concerning general family law arises from interpretation

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5 Marriage Legislation Reference (1912) A.C. 880 at 886.
Citizens Insurance Co. v. Parsons [1881] 7 A.C. 96.

6 Johannesson v. West St. Paul [1952] 1 S.C.R. 292 at 302.
A.G. of Canada v. C.P.R. and C.N.R. (1958) S.C.R. 285 at 299-301.

7 Citizens Insurance Co. v. Parsons (1881) 7 A.C. 96.
Marriage Legislation Reference (1912) A.C. 880.
Kerr v. Kerr and A.G. for Ontario (1934) S.C.R. 72; (1934) 2 D.L.R. 369.

8 Reference concerning Ontario Provincial Legislation on Adoption etc. (1938) S.C.R. 398.

of the ambit of the words 'marriage and divorce' in Section 91(26). Supposing that these words include power to enact laws concerning nullity, judicial separation, restitution of conjugal rights, jactitation of marriage, ancillary orders such as maintenance, alimony and custody of children, can these words be interpreted even more broadly to include the whole field of "family law" viz. laws concerning adoption, legitimacy and legitimation, guardians and wards, neglected children, juveniles, maintenance and support of wives, parents and children, married women's property rights and dower rights?[9]

Since provincial legislatures have made use of their power under Section 92(13) and (14) to enact provincial statutes dealing with such matters and since the Constitutional validity of such provincial legislation has been upheld by the courts it is doubtful whether today such a wide meaning would be given to Section 91.

The Supreme Court stated, in a Reference[10] concerning Ontario provincial legislation on Adoption, etc.

"The starting point for the consideration of the statutes referred to us is this: In point of substantive law it is not disputed that the matters which are subjects of this legislation are entirely within the control of the legislatures of the provinces."

The Supreme Court, in this Reference, realised that there was a

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9 See Master: "Canadian Family Law" unpublished Manitoba (1970-1971) at 27.

10 (1938) S.C.R. 398.

possibility that such provincial legislation was unconstitutional in contravention of Section 91, but it deliberately refused to go into that question or even discuss it. In fact, it deliberately set the issue aside:

"We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by Section 91 of the subject "Marriage and Divorce" whatever may be the extent of that jurisdiction, we are not concerned with it here, and I mention it only to put it aside."

The position today is that the substance of the various provincial statutes concerning family law matters are considered to be not unconstitutional under Section 91 of the B.N.A. Act.

[B] LEGISLATIVE JURISDICTION WITH REFERENCE TO MARRIAGE

INTERPRETATION OF THE B.N.A. ACT 1867 SPECIFICALLY WITH REFERENCE TO "MARRIAGE AND DIVORCE"

The next difficulty which arises from these differences in interpretation concerns the extent of the ambit of the term "Marriage and Divorce" in section 91 with reference to the provisions of Section 92.

With reference to the word "divorce" it is now settled that the Dominion Parliament has exclusive jurisdiction to enact a law concerning divorce which includes not only conferring a power to grant a decree of divorce[11] by a court designated by the Dominion Parliament

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11 Divorce Act S.C. 1968, Ch. 24.

but also to provide for ancillary reliefs such as maintenance and custody orders.[12] In the exercise of this power the Dominion Parliament also repealed other statutes concerning divorce which were applicable in various provinces.

The ambit of the term "marriage" is less clearly defined. Section 91 empowers the Dominion Parliament to enact laws concerning "marriage". Section 92 simultaneously provides that provincial legislatures have power to enact laws concerning the solemnization of a marriage within the province. The Privy Council interpreted these provisions in a manner whereby conflict would be avoided. In Citizens Insurance Co. v. Parsons[13] it stated:

". . . it is obvious that in some cases where apparent conflict exists the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject "marriage and divorce" contained in the enumeration of subjects in Section 91. It is event that "solemnization of marriage" would come within this general description; yet "solemnization of marriage in the province" is enumerated among the classes of subjects in Section 92 and no one can doubt that notwithstanding the general

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12 Whyte v. Whyte 1969 Man. R. page
1969 D.L.R.

13 (1881) 7 A.C. 96.

language of Section 91 that this subject is still within the exclusive authority of the legislatures of the provinces."'

This view that the ambit of the power of the Dominion Parliament to enact laws concerning marriage was not all-pervasive, and was in fact restricted by Section 92 which excluded from its scope laws concerning solemnization, was endorsed in another Privy Council opinion[14] in a Reference concerning Marriage Legislation Bill.

It is apparent therefore that exclusive power conferred on the legislatures of the provinces, to make laws relating to the solemnization of marriage in the province, operates by way of exception to the powers conferred on the Parliament of Canada as regards marriage; also, that the power so conferred on the provincial legislatures enables them "to enact conditions as to solemnization which may affect the validity of the contract."[15] The provincial legislatures could not legislate about matters concerning marriage other than solemnization of the marriage. Thus a provision concerning capacity or non-capacity through consanguinitywas not within the power of the provincial legislature.[16]

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14 In re Marriage Legislation in Canada ("The Marriage Reference Case") (1912) A.C. 880; 7 D.L.R. 629.

15 Ibid.

16 Despatie v. Tremblay (1921) 1 A.C. 702 (P.C.).

[C] STATUS OR CAPACITY TO CONTRACT MARRIAGE

Section 91(26) of the British North America Act provided generally that the area of law concerning marriage and divorce fell broadly within the ambit of the law making power of the Dominion Parliament. From this power were carved specific exceptions for the provinces: provincial legislatures under Section 92(12)(13) and (14) had power to legislate for the solemnization of marriage in the province, property and civil rights in the province, and the administration of justice in the province, including the Constitution, Maintenance and Organisation of Provincial Courts both of Civil and of Criminal Jurisdiction including procedure in civil matters in those courts.

The Dominion Parliament has exclusive power to legislate upon matters relating to the status or capacity required to contract marriage. The Dominion Parliament could thus stipulate that the effect of non-compliance with these requirements would be to render the marriage a nullity. It could of course stipulate that non-compliance would have no effect upon the validity of the marriage, or it could provide some other consequence such as a fine levied on the parties instead of attacking the validity of the marriage. However, the Dominion Parliament has done none of these things.

In the absence of such legislation on the part of the Dominion Parliament, it has already been stated that the law of England applies in Canada. The extent of application of the law of England in the various provinces is far from uniform. However, as of 1972, the position is fairly clear. The Courts in six provinces, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Ontario have jurisdiction to grant a nullity decree on the same basis as did the Court

for Divorce and Matrimonial Causes in England in 1870, under the Imperial Matrimonial Causes Act 1857. New Brunswick and Prince Edward Island have eighteenth or early nineteenth century colonial statutes conferring jurisdiction on the courts. The position in Newfoundland is uncertain. English law prior to 1833 is applicable.

Although the courts of these provinces have jurisdiction to grant declarations and decrees of nullity the question of extent of jurisdiction and grounds of jurisdiction is not at all clear. Historically this uncertainty posed a serious social problem in Canada after 1867.

The questions arise:

(1) Whether the courts in the province have jurisdiction to grant a decree or declaration of nullity;

(2) on what grounds can such relief be given? i.e. what is the extent of jurisdiction over this cause of action?

Alberta: In Board v. Board and the Attorney-General for Alberta,[17] the leading case on the point whether the provincial courts in Alberta

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1919. A.C. 956. P.C. Other cases which indicate that the Alberta courts have jurisdiction to grant a nullity decree are: Henderson (orse Breen) v. Breen. 1923. 2 W.W.R. 480 Alberta C.A.
Reid (orse Francis) v. Francis. 1929. 3 W.W.R. 102;
Ross v. MacQueen 1948. 2 D.L.R. 536; Adelman v. Adelman. 1948 1 W.W.R. 1071 Alberta. Cox v. Cox. 1918. 40 D.L.R. 195. Hobson v. Gray. 1958. 13 D.L.R. 2nd. 404.
Prior to 1919 the Alberta Court took the view it lacked jurisdiction to grant a nullity decree.
B. v. M. 1918. 7 W.W.R. 1197.
See also R.S.A. 1955. Domestic Relations Act, Ch. 89, sec. 17.

have jurisdiction to grant a decree or declaration of nullity, the Privy Council was of the opinion that the provincial courts in Alberta had the same jurisdiction over Matrimonial Causes as the Court for Divorce and Matrimonial Causes in England under the Matrimonial Causes Act of 1857. By virtue of Section 92 of the British North America Act, the provincial legislature had authority to create the Supreme Court for Alberta. In the exercise of this authority it conferred upon the Supreme Court (Section 9 of the Supreme Court Act 1907), all the jurisdiction of the Superior Courts in England and authority to exercise all the power and administer all the laws which the judges of the superior courts in England exercised as of 15th July 1870. Among the laws administered by and the powers exercised by these judges were those conferred by the Imperial Matrimonial Causes Act of 1857 and hence the Supreme Court for Alberta could also exercise these powers and administer these laws. In Board v. Board[17A] the issue related to the right to grant a divorce decree, but the opinion of the Privy Council is equally applicable to decrees and declarations of nullity, the issue of jurisdiction being analogous.

Since the Alberta Court has jurisdiction to grant decrees of nullity on the basis provided in the Matrimonial Causes Act 1857, the next question is that of grounds for the decree. Here, the constitutional problem arises under the British North America Act. For those grounds of nullity which relate to the areas of marriage law which fall within the ambit of the Dominion Parliament's authority under Section 91(26), there is a lacuna in Canadian law, since the Dominion Parliament has not exercised its authority to enact much legislation concerning marriage.

17A (1918) 41 D.L.R. 286.

Hence, for grounds of nullity which relate to non-compliance with the requirements of capacity and essential validity, the provincial courts in Alberta are obliged to draw upon their authority under the Imperial Matrimonial Causes Act 1857 which refers back to the practice of the Ecclesiastical Courts in England. In other words, the type of relief (declaration or decree granted by the Ecclesiastical Courts), and the grounds upon which the Ecclesiastical Courts would have granted such relief insofar as these grounds pertain to capacity and essential validity of marriage, are applicable in the Alberta courts at present. On the other hand, the provincial legislature has authority to enact laws concerning formalities and to prescribe the effect of non-compliance with formalities. Hence the Alberta courts have jurisdiction to grant a nullity decree on the grounds of non-compliance with formalities only where the provincial Marriage Act provides such a ground, by stating that the effect of non-compliance with a particular provision of the Marriage Act is to render the marriage invalid.

In Attorney-General of Alberta and Neilson v. Underwood,[18] a leading case from Alberta, the Supreme Court of Canada held that the provincial courts in Alberta had jurisdiction to grant a nullity decree in a case where the ground of nullity was within the bounds of the provincial legislature's power to enact laws concerning solemnization of a marriage. In this case, the Alberta Solemnisation of Marriage Act[19]

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18 1934. S.C.R. 635 at pages 639 - 40.

19 S.A. 1925, ch. 39 sec. 30.

provided that parental consent was required where the parties to the marriage were underage. The Supreme Court held that this provision was within the terms of reference of Section 92(12) of the British North America Act since it was one of the forms required to be complied with for the marriage ceremony and did not relate to capacity. Hence the province was within its authority in prescribing the effect of non-compliance with the provision; and the provincial courts had jurisdiction to give effect to provincial legislation by granting a decree of nullity.

In neither this case nor the case of Kerr v. Kerr[20] was the issue of the competency of the Dominion Parliament to legislate on matters of essential validity or capacity relevant. Since Dominion legislation did not affect this case, the Supreme Court declined to indicate whether the Courts in Alberta had jurisdiction to declare a marriage a nullity when the ground related to essential validity or capacity.

It might be safely said that matters pertaining to the solemnisation of marriage within the province fall within the scope of provincial legislative authority. Such provincial legislation may be so worded as to affect the validity of marriage and may afford a ground for an action of annulment. The Supreme Court of Canada has accordingly upheld the constitutionality of Ontario and Alberta provincial legislation rendering

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(1934) S.C.R. 72.
Att. Gen. for Alta. and Neilson v. Underwood (1934) S.C.R. 635
Kerr v. Kerr and Att. Gen. for Ontario (1934) S.C.R. 72 [holding Section 17 and 34 of the Marriage Act, R.S.O., 1927 Ch. 181 intra vires of the Ontario legislature].

the marriage of a minor voidable under certain conditions where parental consent has not been obtained. In Attorney-General for Alberta and Neilson v. Underwood, Rinfret, J., delivering the judgment of the court said:[21]

> "The whole question depends upon the distinction to be made between the formalities of the ceremony of marriage and the status or capacity required to contract marriage. Solemnization of marriage is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it. The statute of Alberta, in its essence, deals with those steps or preliminaries in that province. It is only territorial. It applies only to marriages solemnized in Alberta and it prescribed the formalities by which the ceremony of marriage shall be celebrated in that province. It does not pretend to deprive minors domiciled in Alberta of the capacity to marry outside the province without the consent of their parents. Moreover, it requires that consent only under certain conditions and it is not directed to the question of personal status."

With the exception of matters relating to the solemnization of marriage within the province, the Dominion Parliament has ostensibly an exclusive right to make or amend the law which determines the circumstances in which an action for annulment will lie. It would thus appear that a provincial legislature cannot abolish the right to sue for annulment on the ground of impotence nor enlarge the grounds of annulment except, as has been stated, where such enlargement relates to the formalities of the celebration of marriage.[22]

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21 (1934) S.C.R. 631.

22 Despatie v. Tremblay (1921) A.C. 702.

[D] LEGISLATIVE JURISDICTION WITH REFERENCE TO DIVORCE, JUDICIAL SEPARATION AND RESTITUTION OF CONJUGAL RIGHTS

Only the Dominion Parliament can legislate in relation to the substantive law of divorce. Exclusive jurisdiction over the subject was assigned to Parliament by the British North America Act, 1867, Sec. 91(26)--"Marriage and Divorce". Therefore, no provincial legislature or delegate thereof can enact a divorce law where the word "divorce" in Sec. 91 has not been judicially defined. Since, however, the B.N.A. Act of 1867 was passed by the Imperial Parliament after its enactment of the Divorce and Matrimonial Causes Act of 1857 in which "divorce" means the dissolution of a marriage -- divorce a vinculo matrimonii -- it has been assumed, and the assumption must now be considered beyond question, that the word has at least the same meaning in the B.N.A. Act. It seems, however, that the contention is at least an arguable one especially since divorce is associated in Sec. 91(26) with the word "marriage", that "divorce" therein includes "judicial separation", formerly known as divorce 'a mensa et thoro'".

The question of interpretation of the ambit of this provision is whether this authority extends generally over the entire field of matrimonial legislation (including legislation for such relief as judicial separation) with the sole exception of the formalities concerning solemnization of a marriage in the province or whether it is strictly limited to legislation concerning the formation, annulment and dissolution of a marriage.

The better view is in favour of the wider interpretation of Subsection 26. In his speech introducing the Divorce Bill into Parliament,

The Honourable Mr. Trudeau indicates that there is some reason to suppose that the Dominion Parliament could have enacted a comprehensive Act dealing with both judicial separation and divorce, but that for the time being this was not done since it involved far too much negotiation with the provinces concerning existing provincial legislation on judicial separation.[23]

> "In trying to draft the present bill we met with two types of difficulties. The first . . . is related to the field of federal-provincial relations . . ."

The Report of the Special Joint Committee on Divorce also recommended at page 35 that the Divorce Act contain a provision "granting to the courts of all provinces and to the Senate an uniform authority to decree Judicial Separation".

The hitherto accepted view is in favour of the narrower interpretation of subsection 26. Case law[25] and provincial statutes[25] indicate that these reliefs are not considered to be within the ambit of the powers of the Dominion Parliament but within the ambit of the provincial legislatures' power to enact statutes concerning civil rights within the province.

The Alberta legislature, acting apparently on the assumption that

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23 Canadian Hansard: House of Commons Debates Dec. 4th, 1967 page 5014.

24 See O'Leary v. O'Leary. 1923. 1 W.W.R. 501 Alta.

25 See Domestic Relations Act R.S.A. 1955, ch. 89
Queen's Bench Act R.S.S. 1953, Ch. 67, sec. 24.

the subject is a matter of civil rights in the province and not within the scope of the Dominion's powers over marriage and divorce, enacted in 1927 as part of a domestic relations Act provisions purporting to govern judicial separation. It is obvious that the validity of this legislation is doubtful: judicial separation clearly affects the rights and obligations resulting from the marriage status, and if it be remembered that judicial separations were formerly called divorce it is also arguable at least that they fall within the meaning of 'divorce' in Section 91(26) of the B.N.A. Act.[26]

The restitution of conjugal rights, like separation, has been held not to be within the exclusive jurisdiction of Parliament over "marriage and divorce" but a matter concerning civil rights within the Provinces and the Alberta and Saskatchewan legislatures have given effect to the view by enacting statutory provisions.[27] It is arguable as in judicial separation that they fall within the meaning of 'divorce' in section 91(26) of the B.N.A. Act.

It is submitted that it is in the best interest of the people of Canada that the wider interpretation be effectively acted upon in matters of judicial separation and restitution of conjugal rights at

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26 Payne: "Power on Divorce" (Burroughs) 2nd ed. - 1964 at 223.

27 See 'Restitution of Conjugal Rights' under Chapter VIII.

such time as when an over-all revision of Canadian family law is under consideration by the Dominion Parliament in view of the fact that the state of the law is deplorable and uncertainty prevails in several provinces in Canada. Stuart J. observed in O'Leary's case:[28]

> "Why could not our Legislature say in plain terms what facts will justify a decree for alimony or restitution of conjugal rights instead of sending the Court on such a tortuous journey to find out? No one appreciates more than I the inestimable debt all English-speaking countries owe to the law of England but now that we have a Parliament of our own it is a poor following of the proud example of England to falter and fail in the face of such a problem as this and instead of declaring the law in plain terms as she did with respect to divorce to say with lazy inertia, "Oh, follow the law of England whatever you may be able to discover it to be from time to time by a picking out of so much of it as is substantive law from a statute which was enacted for England only and which contains numberless provisions as to procedure, judges, officers, etc., etc."

Later on in the same case Justice Stuart remarked;

> "Finally if a husband instead of the wife should happen to seek for restitution of conjugal rights we should have to travel a different road altogether for sec. 21 of The Judicature Act does not say anything about a husband's rights. We should have to travel, as we did in Board v. Board, supra, through The Alberta Act, 1905, ch. 3, to the old Northwest Territories Act, R.S.C., 1886, ch. 50, back to 1870 and thence by that route to The Divorce and Matrimonial Causes Act again of

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28 (1923) 1 D.L.R. 949.

> 1857. And since Board v. Board this route as well as the route via The Judicature Act is also probably open to the wife."

Finally Justice Stuart concluded:

> "But could anything be more complicated or indeed in some respects absurd than legislation left in this condition?"

DIVORCE PROCEDURE

Sec. 92(14)[29] of the B.N.A. Act gives the provinces authority over the "administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts." The provincial courts and legislatures have therefore acted on the view that the procedure in divorce actions is, at least in the absence of dominion legislation, a matter within the competence of the provincial legislature.[30] There is little doubt, however, but that procedural provisions could be included in a Dominion Divorce Act as necessarily incidental and ancillary to the main objects thereof.

LEGISLATIVE JURISDICTION - ALIMONY AND MAINTENANCE OF SPOUSES AND ANCILLARY ORDERS:

Maintenance as a corollary remedy in divorce proceedings was

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29 See Chapter One page 46.

30 Reference re Divorce Jurisdiction (1952) 2 D.L.R. 513.

introduced by the Divorce and Matrimonial Causes Act (England), 1857 and 1866. Section 32 of the Divorce and Matrimonial Causes Act (England), 1857 empowered the court on any divorce decree to order the husband to secure to the wife such gross or annual sum of money for any term not exceeding her life as, having regard to her fortune, if any, to the ability of the husband and to the conduct of the parties, it should deem reasonable. Since this Section failed to provide relief in cases where the husband had no assets on which maintenance could be secured, the power to order unsecured maintenance was introduced by amending legislation in 1866.[31]

In most Canadian provinces corollary relief in matrimonial causes has been regulated by provincial statutes or rules of court. In Alberta, the jurisdiction to award maintenance in divorce proceedings and other matrimonial causes, and the conditions of its exercise, have been defined in Part III of the Domestic Relations Act.[32]

In considering the respective powers of the Dominion and the provinces in relation to matters incidental to divorce, it has been stated that the aforementioned provincial statutes are intra vires because they

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31 Section 1 of the Divorce and Matrimonial Causes Act (England), 1966 empowered the court on any decree of divorce to make an order on the husband for payment to the wife during their joint lives of a reasonable weekly or monthly sum for her support and maintenance. In the proviso to this section, the court was empowered to discharge, suspend or vary any such order if the husband subsequently became unable to make the payments ordered.

32 R.S.A. 1970, Chap. 113.

relate to matters of property and civil rights, which fall within the constitutional competence of the provincial legislatures under Section 91(13) of the B.N.A. Act.[33] Thus in Lee v. Lee,[34] Harvey, C.J.A. stated:

> "In my opinion it cannot be successfully contended that 'alimony' comes within the subject of 'marriage'. It is true that it presupposes a marriage. It cannot be said that it is essential to divorce for even in England while it is given as an incident to divorce it is given quite apart from divorce upon failure to observe an order for restitution of conjugal rights. It is, in my opinion, nothing more or less than a matter of civil rights arising out of a particular relationship and quite clearly therefore within the jurisdiction of a province if not included within the express words of 'marriage and divorce' which for the reasons I have stated, in my opinion, is not the case."

Similarly, in Langford v. Langford, Murphy J. stated:

> "Divorce is a matter of status which as such does not involve alimony at all. Maintenance or alimony is a matter of property and civil rights and so within the jurisdiction of the province."[35]

It is to be observed, however, that the above decisions, which

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[33] Julien Payne: "Corollary Financial Relief in Nullity and Divorce Proceedings" January 21, 1970 unpublished at p. 4.

[34] (1920) 3 W.W.R. 530; 16 Alta. L.R. 83.

[35] (1936) 1 W.W.R. 174.

affirmed the legislative competence of the provinces to enact statutes regulating corollary relief in divorce proceedings, were reached at a time when the Dominion Parliament had not sought to occupy the field and they must now be reconsidered therefore in light of the corollary provisions of the Divorce Act (Canada), 1968.

In the Report of The Special Joint Committee of The Senate and House of Commons on Divorce (Canada, 1967) it is asserted that the exclusive jurisdiction over "marriage and divorce" assigned to the Dominion Parliament by Section 91(26) of the B.N.A. Act extends to include jurisdiction over matters corollary to divorce:

> "Parliament has not in recent years dealt with matters ancillary to divorce. Hitherto, these matters have been dealt with by the provinces, if for no other reason than that Parliament has refrained from doing so. The Committee is of the opinion that the exclusive jurisdiction of Parliament over divorce includes legislative authority over matters ancillary to divorce. Divorces alter the legal status created by the marriage. Jurisdiction with regard to divorce thus includes the abolition of the rights and obligations created by the marriage and the restoration of certain pre-existing rights. Such rights can be terminated or restored in whole or in part.
>
> A husband has a duty to maintain his wife. That obligation normally ceases when the marriage is dissolved because the relationship between the parties no longer exists. As Parliament is competent to legislate to divorce, it may also define the extent to which a dissolution of marriage alters the rights and obligations inherent in marriage. Parliament can, therefore, provide for the continuation of the obligation of the husband to support the wife.

> A similar argument can be advanced regarding the maintenance and custody of children. While a marriage exists both parents have joint custody of the children and the husband is under an obligation to provide for their maintenance and education. The termination of the marriage by a divorce interferes with these obligations and Parliament's jurisdiction, relative to divorce, necessarily includes authority to stipulate to what extent they shall be continued, altered or destroyed."[36]

The assertion that the power to award maintenance is necessarily incidental to divorce and therefore within the jurisdictional competence of the Dominion Parliament derives some support from dicta in English[37] and Canadian[38] cases.

The power to award corollary relief in divorce proceedings would now appear to be exclusively regulated by the provisions of the

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36 Report of the Special Joint Committee of The Senate and House of Commons on Divorce (Canada - 1967), at pp. 56-57.

37 See Hayman v. Hayman (1929) A.C. 601.

> "It is, in my opinion, associated with and inseparable from the power to grant this change of status that the courts have authority to decree maintenance for the wife."

And Lord Hailsham said:

> "I do [hold] that the power of the court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the court or preclude the court from the exercise of that jurisdiction."

38 Rex v. Vesey 12 M.P.R. 307, Baxter J. observed

> "It is true that the federal parliament might legislate so as to confer jurisdiction upon a provincial court in a matter of alimony."

Divorce Act (Canada), 1968. Sections 10 and 11[39] of the Divorce Act 1968 authorize the courts to make orders concerning the payment of alimony by either spouse and payment of maintenance for the support of children. The Constitutional validity of those sections has been challenged. The thrust of the challenge is that the term "marriage and divorce" in Section 91(26) of the British North America Act should include only a divorce decree per se and not all matters incidental thereto, and that the provinces have exclusive jurisdiction to legislate for civil rights within the province under Section 92, so that any legislation concerning maintenance or custody enacted by the Dominion Parliament would violate the powers of the provinces. This challenge has been effectively dealt with in Whyte v. Whyte[40] and Todd v. Todd[41]

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39 See Chapter VIII. The difference between the terms "alimony" and "maintenance" is that alimony refers to payments made to a wife qua wife so long as she retains that status, whereas a maintenance payment may be made to any person and would include a woman who was formerly the payor's wife. Thus Section 10 uses the terminology of "alimony" for payments made to a wife pending a divorce whilst she still retains the status of wife, whereas Section 11 uses the terminology "maintenance payments". Maintenance must be sought at the time of trial. If no maintenance order is made at this time, the petitioner cannot subsequently seek it. See Todd v. Todd, 1970, 5 D.L.R. 92 (B.C.) "She who seeks maintenance must speak at the trial or forever thereafter hold her peace".

40 1969. 69 W.W.R. 536. Man. C.A.
See also Ritchie v. Ritchie, 1970 3 D.L.R. 3rd. 676 B.C.

41 1969. 68 W.W.R. 315 B.C.S.C. See Also Niccolls v. Niccolls and Buckly, 1969 68 W.W.R. 307, B.C.S.C. See also Jordan, "The Federal Divorce Act 1968 and the Constitution" 1968. 14 McGill Law Journal 209.
Report of the Special Joint Committee on Divorce pages 27-29 and 56-60.

where the Court of Appeal in Manitoba and the Supreme Court of British Columbia both stated that Sections 10 and 11 of the Divorce Act were intra vires of Section 91(26) of the British North America Act 1867 and were constitutionally valid.

In view of the judicials' opinions concerning the respective powers of the Dominion and the provinces it may be reasonable to conclude that, whereas the aforementioned provincial statutes were intra vires in the absence of any conflicting federal legislation relating to corollary relief in divorce proceedings, the corollary provisions of the Divorce Act (Canada), 1968 now supersede any provisions of the provincial statutes which are inconsistent therewith.[42] It should be noted, however, that the corollary provisions of the aforementioned federal statute are confined to maintenance and custody in divorce proceedings and accordingly corollary powers relating to settlements on divorce remain subject to provincial control, as do also all corollary powers exercisable in matrimonial causes other than divorce.[43]

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42 Attorney General of British Columbia v. Smith; (1967) 65 D.L.R. (2d) 82.

43 See Payne: supra note at p. 6; See also The Report of the Special Joint Committee of the Senate and House of Commons on Divorce (Canada - 1967) at p. 59. Wherein it is suggested that the Dominion Parliament may lack jurisdiction to enact legislation relating to the disposition of property in divorce proceedings.

[E] CONCLUSION

As a result of the above discussion it may be concluded that under the present division of powers, it appears the the Dominion Parliament has power under Section 91 to enact laws concerning:

1. Marriage: Exclusive power is conferred on the legislature of the provinces to have laws relating to the solemnization of marriage in the province operate by way of exception to the powers conferred on the Parliament of Canada. The power so conferred on the provincial legislature enables them to enact conditions as to solemnization which may affect the validity of a contract.

2. Divorce.

3. Nullity: The Dominion Parliament has exclusive powers to legislate upon matters relating to the status or capacity required to contract marriage. Dominion Parliament stipulates that the effect of non-compliance would be to render the marriage a nullity.

With the exception of matters relating to the solemnization of marriage within the Province, the Dominion Parliament has ostensibly an exclusive right to make or amend the law which determines the circumstances in which an action for annulment will lie. It would thus appear that a provincial legislature cannot abolish the right to sue for annulment on the ground of impotence nor enlarge the grounds of annulment except, as has been stated, where such enlargement relates to the formalities of the celebration of marriage.

4. Judicial Separation was formerly called divorce and it is at least arguable that they fall within the meaning of divorce in Sec. 91(26) (Marriage and Divorce of the B.N.A. Act). So far this

section has been narrowly interpreted. Case law and provincial statutes indicate that mere reliefs are not to be considered to be within the ambit of the powers of the dominion parliament but within the ambit of provincial legislative powers to enact statutes concerning civil rights within the province.

It is submitted that the powers of the Dominion Parliament extend generally over the entire field of matrimonial legislations [including legislation for such reliefs as judicial separation and restitution of conjugal rights] with the sole exception of the formalities concerning solemnisation of the marriage in the province.

5. The Dominion Parliament has power to make laws concerning alimony maintenance and custody of children insofar as they arise in conjunction with divorce, nullity, judicial separation or restitution of conjugal rights. In most Canadian Provinces corollary reliefs in matrimonial causes has been regulated by provisional statutes on rules of court. The provincial statutes are <u>intra vires</u> in the absence of any conflicting federal legislation over same matters. Corollary Provisions of the Divorce Act (Canada) 1968, now supersedes any provisions of the provincial statutes which are inconsistent therewith.

6. The provincial legislatures have law making powers concerning all other aspects of family law [e.g. settlements of property on divorce] not specifically provided for by the Dominion Parliament, insofar as such aspects are of concern to the province.

APPENDIX II

GLOSSARY

Anuloma	Union in which the male is of a higher caste
Apastamba	A great Hindu sage and a writer of an important smriti that bears his name
Ardhangini	A woman is half her husband and completes him
Aurasa	Legitimate son of the body
Bandu	Cognate
Brahmans	A higher caste among Hindus
Coparcenary	A narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property.
Dasiputra	Son of a kept concubine
Devdasi	Female attendant of an idol
Dharma	Righteousness, law, duty, merit (of an individual)
Dharmasastra	Science of Dharma, jurisprudence; they are generally works written in verse or prose or mixed prose and verses
Dowry	Any property or valuable security given or agreed to be given between the parties to the marriage, or by any person to any person at, before or after the marriage
Gotra	Agnatic lineage
Joint Hindu Family	A Joint Hindu Family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters
Kanyadan	A ceremony of giving the bride to the bridegroom at the time of marriage
Karta	Manager
Kaseph Kiddushim	A betrothal ceremony among the Jewish community in India
Katuba	A written contract between the parties essential to the validity of the Jewish marriage
Kutumba	Family

Manu	The composer of the code of Manu or Laws of Manu or Manu Smriti. His works have always been treated by Hindu sages and commentators, from the earliest times, as being of paramount authority.
Nagnika	A girl of tender years who is unmindful of her nudity
Nibandha	Digest
Nirakarana	Expulsion
Pandits	Individuals who are learned in Dharmasastra
Panigrahana	A ceremony in which the bridegroom holds the bride's hand and goes around the sacred fire
Pinda	Rice-bowl
Pratiloma	Union in which the female is of higher caste
Pujari	Priest
Sagotra	Members of the same gotra
Samskara	Sacrament. A set of ceremonies performed to accomplish marriage
Sapinda	Agnatic or Cognate who share in the same rice-bowl.
Saptapadi	A ceremony in which the bride and the bridegroom take seven steps around the sacred fire
Sati	An ancient custom of burning the widow alive on her husband's funeral pyre.
Shruti	See Vedas
Shulka	Price
Smriti	Text embodying traditional (legal) learning; the body of the recorded or remembered law
Talak	Divorce
Varadakshina	Any property or valuable security given or received in contemplation of marriage
Vedas	The general name of the chief scriptural authorities of the Hindus; it is properly applied to the four canonical works entitled severally the Rigveda, Yajurveda, Samaveda and Atharvaveda
Yajnavalkya	A great Hindu sage and a writer of an important smriti that bears his name

APPENDIX III

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Jina Magan v Vai Jethi (1941) Bom. 538
Johnstone v Johnstone (1969) 2 Ont. R. 765
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Mohanlal v Mohan Bai A.I.R. (1958) Rajth 71
Moreno v Moreno (1920) 47 Cal. 1068

Moss v Moss (1897) 66 L.J.P. 263
Mt. Titli v Alfred Robert Jones A.I.R. (1933) All. 122
Mukan Kunwar v Ajeet Chand A.I.R. (1958) Rajth. 322
Mulhouse v Mulhouse (1966) P. 39
Mummary v Mummary (1942) 1 All. E.R. 553
Munshee Buzloor v Shumsoonia (1909) 11 M.I.A. 551
Munshiram v Emperor A.I.R. (1936) All. 11
Myna Boyee v Dotaram (1861) 8 M.I.A. 400
N v N (1969) 4 D.L.R. (3d) 639
Narayan v Laving (1878) 2 Bom. 140
Narayanan v Unninayya (1945) 1 M.L.J. 145
Nanjoket v Bratushes (1942) 2 W.W.R. 97
Niboyet v Niboyet (1878) P.D. 1
Niccolls v Niccolls (1969) 68 W.W.R. 307
Norton v Seton (1819) 161 Eng. Rep. 1383
Novak v Novak (1969) 68 W.W.R. 524 (B.C.)
O'Leary v O'Leary (1923) 19 Alta. L.R. 224
Orford v Orford (1921) 49 O.L.R. 15
Orme v Orme (1824) 162 E.R. 335
P v P (1962) 3 All. E.R. 919
P(D) v P(J) (1965) 1 W.L.R. 963
P.S. Sivaguru v P.S. Saroja A.I.R. (1960) Mad. 216
Palanippachetty v Alagan (1921) 48 I.A. 539
Pardy v Pardy (1939) 3 All. E.R. 779
Parojcic v Parojcic (1959) 1 All. E.R. 1
Paskiewich v Paskiewich (1969) 2 D.L.R. (3d) 622 (B.C.)
Patou v Patou (1847) 28 N.Z.L.R. 840
Payne v Payne (1891) 45 Minn. 467
Pennie v Pennie (1966) 52 M.P.R. 68
Perry v Perry (1952) 1 All. E.R. 1076
Phillips v Phillips (1948) 3 D.L.R. 221
Phillips v Phillips (1844) 1 Rob. Ecc. 144
Pointon v Pointon (1922) 38 T.L.R. 848
Pollard v Wybourne (1828) 162 Eng. Rep. 732
Poope v Poope (1940) 3 D.L.R. 454
Pranmohandas v Harimohan (1925) 52 Cal. 425

Premchand v Bai Gala (1927) 29 Bom. 1336

Preston Jones v Preston Jones (1951) 1 All. E.R. 124

Pritchard v Pritchard (1864) 3 Sw. & Tr. 523

Pulford v Pulford (1923) P. 18

Purshotamdas v Purshotamdas (1887) 21 Bom. 23

Pybus v Pybus (1970) 2 W.W.R. 315

R v Clarke (1949) 2 All. E.R. 448

R v Tolson (1889) 2 Q.B.D. 168

Racine v Boivin (1939) 44 R.L. 410 (N.S.)

Rae v Rae (1944) O.R. 266

Rajendra Bahadur v Roshan A.I.R. (1950) All. 92

Rajni v Prabhakar (1957) 59 Bom. 1169

Rambhat v Timmayya (1892) 16 Bom. 673

Ramekbal v Harihar A.I.R. (1962) Pat. 343

Rampiyar v Deva Ram A.I.R. (1923) Rang. 129

Ramprasad Seth v The State of U.P. A.I.R. (1961) All. 334

Rani Bhagwan Koer v Bose (1903) 30 I.A. 249

Rau v Sital A.I.R.(1939) All. 340

Redpath v Redpath (1950) 1 All E.R. 600 (C.A.)

Reg. v Wood (1903) 6 D.L.R. 41

Reference Concerning Ontario Provincial Legislation on Adoption (1938) S.C.R. 398

Reid v Francis (1929) 3 W.W.R. 102

Reid v Reid (1969) 71 W.W.R. 375 (B.C.S.C.)

Repetti Bulli v Repetti Nakalaju A.I.R. (1958) A.P. 611

Resnick v Resnick (1970) 1 O.R. 524 (Ont.)

Rex v Vesey 12 M.P.R. 307

Ritchie v Ritchie (1953) 2 D.L.R. 730

Robson v Robson (1969) 2 O.R. 857

Rodier v Rodier (1969) B.R. 966

Roger v Roger (1830) 3 Hag. 57

Rooke v Rooke (1934) Bom. 230

Ross v MacQueen (1948) 2 D.L.R. 536

Rowland v Rowland (1969) 2 O.R. (Ont. S.C.)

Rumbelow v Rumbelow (1965) P. 207 (H.C.)

Rupchand v Jumbo Pershad (1910)37 I.A. 93

Rushton v Rushton (1968) 66 W.W.R 764

Russell v Russell (1897) A.C. 395 (H.C.)

Russell v Russell (1961) 28 D.L.R. (2d) 547

S v S (1906) 77 N.E. 1025

S v S (otherwise C) 3 All E.R. 736

Saldanha v Saldanha (1930) I.L.R. (Bom.) 301

Sangster v Sangster (1954) S.A.S.R. 117

Sankarlingam v Sabban (1894) 17 Mad. 479

Sasivarnam v Guana Sundari (1954) I.L.R. (Mad.) 737

Saunders v Saunders (1965) P. 499

Schlesinger v Schlesinger (1959) 1 All E.R. 155

Scott v Scott (1959) 1 All E.R. 531

Scott v Sebright (1826) 56 L.P.J. 11

Seller v Funk (1914) 32 D.L.R. 99

Seminuk v Seminuk (1969) 68 W.W.R. 249

Shaw v Shaw (1954) 2 All E.R. 638 (C.A.) (U.K.)

Shaw v Shaw (1939) 2 All E.R. 381

Sheldon v Sheldon (1966) 2 All E.R. 257

Sherlock v Sherlock (1970) 13 D.L.R. 255

Shirinbai v Khershedji (1936) 22 Bom. 430

Short v Stone (1846) 8 Q.B. 358

Singh v Singh (1971) 2 W.L.R. 963

Sivanandy v Bhagavathamma A.I.R. (1962) Mad. 400

Smith v Smith (1952) 3 D.L.R. 449

Sobush v Sobush (1931) 2 W.W.R. 900

Sonabati Devi v Narayan Chandra A.I.R. (1936) Pat. 423

Spicer v Spicer (1954) 3 All E.R. 208

Spiers v Hunt (1908) 1 K.B. 720

Squire v Squire (1949) P. 51

Srinivasa Aiyer v Sesha Aiyer (1918) 41 Mad. 197

State of Bombay v Narasu Appamati A.I.R. (1952) Bom. 84

Stevenson v Stevenson (1958) 1 All E.R. 155

Stewart v Stewart (1945) 18 M.P.R. 302

Strachan v Strachan (1970) 72 W.W.R. 383 (B.C.S.C.)

Subramaniyam v Ponnak Shiammal A.I.R. (1958) Mad. 41

Sushila v Mahendra A.I.R. (1960) Bom. 117

Swift v Kelly (1835) 3 Knapp 257
Swinemar v Swinemar (1970) 9 D.L.R. 201
Szechter v Szechter (1970) 3 All. E.R. 905
T. Ranga Swami v Aravindammal A.I.R. (1957) Mad. 243
Tannis v Tannis (1970) 8 D.L.R. 333
Tehait v Basant Kumar Singh (1901) 28 I.L.R. (Cal.) 75
Terry v Hutchinson (1868) 3 Q.B. 599
Teskey v Teskey (1968) 67 W.W.R. 134
Thangammal v Gengayammal A.I.R. (1945) Mad. 308
Thapita v Thapita (1894) 17 Mad. 235
Thomas v Thomas (1945) 2 W.W.R. 379
Thomson v Thomson (1971) 4 W.W.R. 383
Tice v Tice (1957) 2 D.L.R. 591
Timms v Timms (1910) 13 W.L.R. 636
Tindall v Tindall (1953) 1 All E.R. 139
Todd v Todd (1970) 5 D.L.R. 92 (B.C.)
Tomberg v Tomberg (1942) 3 D.L.R. 687
Tomkins v Tomkins (1858) 1 Sw. & Tr. 168
Tranter v Tranter (1925) N.Z.L.R. 593
Trikamganda v Shirappa (1943) Bom. 706
Trites v Trites (1970) 9 D.L.R. 246 (Ont.)
Tscheids v Tscheids (1963) 41 D.L.R. 138 (Sask.)
Umed v Nagindas (1870) 7 Bom. H.C. 122
Valier v Valier (1925) 133 L.T. 830
Vanzoost v Vanzoost (1969) 7 D.L.R. (3d) 373 (N.S.)
Veerappa v Michael A.I.R. (1963) Mad. 286
Velayutha v Suryamurthi A.I.R. (1941) Mad. 219
Vempa v Vempa A.I.R. (1957) A.P. 424
Verboski v Hunt (1945) Man. Rep. 342
Verry v Watkins (1836) L.R. 3 Q.B. 599
Vishnu v Akkamma (1911) 34 Mad. 496
Vogt v Vogt (1970) 2 N.B.R. (2d) 87 (N.B.)
Walker v Walker (1962) P. 42
Warden v Warden (1951) O.W.N. 381
Watson v Watson (1938) P. 258
Watts v Watts (1908) A.C. 573
Weatherley v Weatherley (1947) 1 All E.R. 563

Webb v Webb (1969) 3 D.L.R. 100

Weldon v Weldon (1883) 9 P.D. 52

White v White (1968) 69 D.L.R. (2d) 60 (N.S.)

Whittaker v McNeilly (1958) 23 W.W.R. 210

Whyte v Whyte (1969) 69 W.W.R. 536 (Man.)

William Hudson v Webster A.I.R. (1937) Nad, 537

Williams v Williams (1964) 3 W.L.R. 215

Wilson v Carnley (1908) 1 K.B. 729 (C.A.)

Windeatt v Windeatt (1963) P. 25

Wolf v Wolf (1931) 194 App. Div. 33

Woodbury v Woodbury (1948) 2 All E.R. 684

Woolard v Woolard (1955) P. 85

Wright v Wright (1960) P. 85

X v X (1933) 2 W.W.R. 413

Yarrow v Yarrow (1892) P. 92

Zelesky v Zelesky (1969) 1 D.L.R. (3d) 471

APPENDIX IV

BIBLIOGRAPHY

Acharya: "Glories of Indian on Indian Culture and Civilization) (Bombay) (1962)

Allen: "Aspects of Justice" (London) (1958)

Bagga: "Statutory Changes in Hindu Law" (Allahabad) (1st ed - 1969)

Baker: "Divorce - Adultery" (1953) 31 C.B.R. 440

Barwick: "The Commonwealth Marriage Act 1961" 1962 Melbourne Unv. L.R. 277

Bedwell: "Artificial Insemination as Adultery" (1946) 24 C.B.R. 420

Bedwell: "Reconciliation and Divorce" (1947) 25 C.B.R. 269.

Bhashyam: "Women in Hindu Law" (Madras) (1928)

Biggs: "The Concept of Matrimonial Cruelty" (Athlone Press - London) (1962)

Blackstone: "Commentaries on the Law of England" (Oxford) (21st ed - 1857)

Blumensteim: "Matrimonial Jurisdiction in Canada" (1928) 6 C.B.R. 570

Brewin: "Condonation - Revival" (1945) 23 C.B.R. 700

Bromley: "Family Law" (Butterworth - London) (3rd ed. - 1966)

Brown & Watts: "Divorce and Matrimonial Causes" (Stevens) (9th ed. - 1921)

Buhler: "The Laws of Manu" (New York) (1969)

Callahan: "The Law of Separation and Divorce" (Oceana - New York)(1965)

Carroll: "Marriage in Quebec" (Oakes Press) (1936)

Cartwright: "Collusion" (1947) 25 C.B.R. 352

Cartwright: "Connivance" (1951) 29 C.B.R. 203

Castel: "Conflict of Law" (Butterworths) (2nd ed. - 1968)

Castel: "The Civil Law System of the Province of Quebec" (Butterworths) (1962)

Chapman: "Law and Marriage" (McGraw-Hill) (1968)

Chaudhari: "The Hindu Marriage Act" (Bombay) (1955)

Cheshire: "Private International Law" (Butterworths) (7th ed. - 1966)

Coke: "Coke upon Littleton" (London) (1628)

Cowen: "Divorce-Adultery" (1950) 28 C.B.R. 95

Davis: "The Rule in Hyde v Hyde" (1969) 18 I.C.L.Q. 187

Deech: "Comparative Approaches to Divorce" (1972) 2 Mod.L.R. 113

Deolalkar: "The Hindu Marriage Act 1955" (Allahabad) (2nd ed. - 1964)

Derrett: "An Introduction to Modern Hindu Law" (Calcutta) (1963)

Derrett: "Hindu Law - Past and Present" (Calcutta) (1955)

Derrett: "Private International Law and Personal Law" (1965) 14 I.C.L.Q. 1370

Dicey & Morris: "Conflict of Laws" (Stevens) (8th ed. - 1967)

Doherty: "Condonation - Revival" (1931) 9 C.B.R. 227

Donelson: "Married Today Single Tomorrow" (New York) (1969)

Egbert: "Divorce-Adultery" (1952) 30 C.B.R. 753

Eversley: "Domestic Relations" (Sweet & Maxwell) (6th ed. - 1951)

Falk: "Jewish Matrimonial Law in the Middle Ages" (Oxford) (1960)

Feinsinger: "Legislative Attack on Heart Balm" (1935) 33 Mich. L. Rev. 979

Foote, Levy & Sander: "Cases and Materials on Family Law" (Little Brown - Boston) (1966)

Forbes: "Divorce Law" (MacDonald & Evans - London) (1970)

Fyzee: "Outlines of Mohammedan Law" (Allahabad) (1955)

Gledhill: "The British Commonwealth" (London) (2nd ed. - 1964)

Grant: "Family Law" (London) (1970)

Graveson: "Status in the Common Law" (London) (1953)

Gupte: "Hindu Law of Marriage" (Bombay) (1961)

Hall: "Sources of Family Law" (Cambridge) (1966)

Hamawi: "Family Law" (Stevens) (1953)

Hambley & Turner: "Cases and Materials on Australian Family Law" (Sydney) (1971)

Henry: "French Civil Code" (Paris) (1930)

Herbert: "Prior Separation Agreement - a Bar to Alimony" (1956) 34 C.B.R. 421

Hogg: "Parliamentary Divorce in Canada" (1924) 3 C.B.R. 421

Holdsworth: "A History of English Law" (London) (1924)

Hughes: "Family Law" (1971) 5 Ottawa L.R. 176

Hume: "Anger's Digest of Canadian Law" (Toronto) (23rd ed. - 1971)

Hussain: "Administration of Justice during the Muslim Rule in India" (Calcutta)(1934)

Inglis: "Family Law" (New Zealand) (2nd ed. - 1968)

Jackson: "The Formation and Annulment of Marriage" (Butterworths) (2nd ed. - 1969)

Jain: "Indian Legal History" (Bombay) (2nd ed. - 1966)

Jain: "The Marriage and Divorce Laws of India" (Tokyo) (1960)

Jayaswal: "Manu & Yajnavalkya - A Basic History of Hindu Law" (Butterworths) (1930)

Johnson: "Family Law" (London) (1st ed. - 1958)

Jorden: "The Federal Divorce Act 1968 and the Constitution" (1968) 14 McGill L.J. 209

Kane: "History of Dharmasastra" (Bombay) (Vol. 2 - 1941)

Keyes: "The Validity of the Common Law Marriage in Ontario" (1967) Osgoode Hall L. Rev. 58

Khetarpal: "Codification of Hindu Law" (Hague) (1968)

Khetarpal: "Modern Concept of Cruelty" (1964) 6 Malayan L.R. 303

Khuda Baksh: "Studies: Indian & Islamic" (London) (1927)

Khuda Baksh: "Essays: Indian & Islamic" (London) (1912)

Kronby: "Divorce Practice Manual" (Butterworths) (1969)

Kuchler: "The Law of Engagement and Marriage" (Oceana-New York) (1966)

Kumud Desai: "Indian Law of Marriage and Divorce" (Bombay) (1st ed. - 1964)

Laskin: "Canadian Constitutional Law" (Carswell) (3rd ed. - 1966)

Latey: "Conflicts of Jurisdiction in Matrimonial Causes" (1965) 14 I.C.L.Q. 845

Lindey: "Separation Agreements, Ante-Nuptial Contracts and Marriage Settlements" (New York) (1937)

Lipstein: "Indian Yearbook of International Affairs" (Bombay)(Vol.VI-1957)

MacDonald: "The Constitution in a Changing World" (1948) 26 Can.B.R. 21

MacDonald & Ferrier: "Canadian Divorce Law & Practice" (Toronto) (1969)

Maitland: "Roman Canon Law in the Church of England" (London) (1898)

Manchanda: "The Law and Practice of Divorce" (Allahabad) (3rd ed.-1969)

Master: "Canadian Family Law" (Unpublished) (Manitoba) (1970-71)

Mayne: "A Treatise on Hindu Law and Usage" (Madras) (11th ed.-1953)

Mitchell: "Collusion" (1947) 25 C.B.R. 657

Mitter: "The Position of Women in Hindu Law" (Calcutta) (1913)

Moore: "Introduction to Canon Law" (Oxford) (1967)

Morley: "Administration of Justice in British India" (London) (1858)

Mulla: "Principles of Hindu Law" (Bombay) (13th ed. - 1966)

Mulla: "Principles of Mohammedan Law" (Bombay) (1966)

O'Gorman: "Lawers and Matrimonial Cases" (Toronto) (1963)

Panikar: "Hindu Society at Cross Road" (Asia) (1961)

Partington: "Polygamous Marriages" (1967) 16 I.C.L.Q. 805

Payne: "Corrollary Financial Relief in Nullity and Divorce Proceedings - Permanent Orders, Reproduced for the Seminar in Developments in Divorce Law" (Unpublished) (Edmonton April 14, 1972)

Payne: "Power on Divorce" (Burroughs) (2nd ed. - 1964)

Payne: "The Divorce (Canada) Act 1968" (1969) 8 Alta. L.R. 26

Pollock and Maitland: "The History of English Law" (Oxford) (1899)

Porter: "Conduct Conducing to Adultery" (1949) 27 C.B.R. 855

Power: "Law and Practice of Divorce in Canada" (1948) 26 C.B.R. 1147

Read: "Separation Agreements - a Bar to Restitution of Conjugal Rights" (1934) 12 C.B.R. 670

Rees: "Divorce Handbook" (London) (1963)

Reuben: "Everything you have always wanted to know about sex" (New York) (1970)

Ryan: "An Introduction to Civil Law" (Australia) (1962)

Sampath: "Marriageable Age, Consent and Soundness of Mind in Indian Matrimonial Law - A Plea for Rationalization: (1969) Benaras L.J. 29

Shah: "History of the Hindu Code" (1958) Bom. L.J. 81

Sinha: "The Hindu Marriage Act 1953 - An Experiment in Social Legislation (1968) 8 S.C.D. 25

Smith and Guttman: "Cases and Materials on Domestic Relations" (University of Alberta) (1962)

Srinivasan: "Hindu Law" (Allahabad) (4th ed. - 1969)

Stanfield: "Collusion" (1947) 25 C.B.R. 80

Swachammer: "Custody and Maintenance of Infants" (1966) 5 W.L.R. 126

Taylor: "Divorce in Canada" (1945) 23 C.B.R. 495

Tolstoy: "The Law and Practice of Divorce" (Sweet & Maxwell) (6th ed.- 1967)

Tolstoy: "Void and Voidable Marriages" (1964) Mod. L. Rev. 385

Toose, Watson & Benjafield: "Australian Divorce Law and Practice" (Australia) (1968)

Von Mehren: "The Civil Law System" (Prentice Hall) (1967)

Webb: "Bigamy and the Capacity to Marry" (1965) 14 I.C.L.Q. 659

Webb: "Engagement and the Conflict of Laws" (1966) 11 I.C.L.Q. 947

Webb, Caldwell and Davis: "Source Book of Family Law" (Butterworths) (1967)

Westmen & Cline: "Divorce is a Family Affair" (1972) 4 R.F.L. 310

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